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Summary

MARCEL LAFRANCE, COMPLAINANT, AND
LAROSE-PAQUETTE AUTOBUS INC.,
RESPONDENT EMPLOYER.

Board File: 745-3580

Decision No.: 815

Résumé de Décision

MARCEL LAFRANCE, PLAIGNANT, ET
LAROSE-PAQUETTE AUTOBUS INC.,
EMPLOYEUR INTIMÉ.

Dossier du Conseil: 745-3580

Décision N°: 815

Unfair labour practice complaint
filed against an employer pursuant
to section 94(3)(a)(i) of the
Canada Labour Code (Part I -
Industrial Relations) following a
dismissal. The employer is a
corporation.

The employer challenges the onus of
proof imposed by section 98(4) of
the Code as being contrary to
sections 7 and 15 of the Canadian
Charter of Rights and Freedoms.

Interim decision pursuant to
section 20 of the Code. The
preliminary objection was dismissed.
A corporation is not entitled to
invoke the protection of sections 7
and 15 of the Charter which only
apply to individuals. The Board
restated the position it had
expressed in decisions Maritime
Employers' Association (1987), 69 di
41; and 17 CLRBR (NS) 355 (CLRB
no. 617), and Frederick Transport
Limited (1988), 73 di 33; and 88
CLLC 16,021 (CLRB no. 674). It also
followed the Supreme Court judgment
in Irwin Toys Limited v. Quebec
(Attorney General), [1989] 1 S.C.R.
927, that a corporation cannot
invoke sections 7 and 15 of the
Charter. The Board also found that
according to the Supreme Court
judgment in Her Majesty the Queen v.
Big M Drug Mart, [1985] 1 S.C.R.
295, the employer did not have
standing, given that no penal
proceedings were involved.

Plainte de congédiement pour
activités syndicales en vertu du
sous-alinéa 94(3)a)(i) du Code
canadien du travail (Partie I -
Relations du travail). L'employeur
est une société par actions.

Fardeau de la preuve du paragraphe
98(4) du Code contesté par
l'employeur en vertu des articles 7
et 15 de la Charte canadienne des
droits et libertés.

Décision partielle en vertu de
l'article 20 du Code. Le moyen
soulevé par l'employeur est rejeté.
Une société ne peut invoquer la
protection des articles 7 et 15 de
la Charte qui ne s'appliquent qu'aux
individus. Le Conseil a suivi ses
décisions dans les affaires
Association des employeurs
maritimes, (1987), 69 di 41; et 17
CLRBR (NS) 355 (CCRT n° 617), et
Frederick Transport Limited (1988),
73 di 33; et 88 CLLC 16,021 (CCRT
n° 674), ainsi que l'arrêt de la
Cour suprême du Canada dans Irwin
Toys Limited c. Québec (Procureur
général), [1989] 1 R.C.S. 927, au
sujet du défaut d'intérêt d'une
compagnie pour invoquer les articles
7 et 15 de la Charte. Le Conseil a
également jugé que l'arrêt Sa
Majesté La Reine c. Big M Drug Mart,
[1985] 1 R.C.S. 295, ne permettait
pas non plus à l'employeur de se
prévaloir de la Charte vu qu'aucune
poursuite pénale n'était en cause.





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Reasons for decision

Marcel Lafrance,
complainant,
and
Larose-Paquette Autobus Inc.,
respondent employer.
Board File: 745-3580

The Board was composed of Mr. Serge Brault, Vice-Chairman, and Messrs. François Bastien and Robert Cadieux, Members.

Appearances:

Mr. Maurice Laplante, assisted by Mr. Gilles Girard, for the complainant; and

Mr. Rolland Pépin, assisted by Ms. Claire Duthé, for the employer.

These reasons for decision were written by Mr. Serge Brault, Vice-Chairman.

I

THE PROCEDURE

Pursuant to section 20 of the Code, this decision deals with a preliminary objection heard in Montréal on June 28 and 29, 1990.

The Board has before it a complaint of unfair labour practice, as amended on June 28, that was filed pursuant to section 94(3)(a)(i) of the Canada Labour Code (Part I - Industrial Relations) by Marcel Lafrance (the complainant) against Larose-Paquette Autobus Inc. (the employer), which is a coach operator. At the beginning of the hearing on June 28, the complainant alleged through his counsel that

his employer had dismissed him specifically because of his membership in the Syndicat des travailleurs(euses) de Larose-Paquette Inc. (CNTU), of which he was the president when he was dismissed on March 5, 1990.

Section 94(3)(a)(i) of the Code provides:

"94.(3) No employer or person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,..."

The effect of filing a complaint referred to in section 94(3) of the Code is described as follows in section 98(4):

"98.(4) Where a complaint is made in writing pursuant to section 97 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 94(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party."

(emphasis added)

II

THE PRELIMINARY OBJECTION

Counsel for Larose-Paquette Autobus Inc., in his amended reply to the complaint, raised a preliminary objection based on sections 7 and 15 of the Canadian Charter of Rights and Freedoms.

As part of this objection he asked the Board to set aside the presumption in section 98(4) of the Code on the basis of the following provisions of the Charter:

"7. Every person has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

...

15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

Neither party adduced evidence to support its arguments and the Board was satisfied that it could decide the matter in a preliminary fashion.

III

THE ARGUMENTS

1. Arguments of Larose-Paquette Autobus Inc.

Section 7 of the Charter guarantees the right of everyone to life, liberty and security of the person. According to counsel for Larose-Paquette, filing a complaint under section 98(4) of the Code violates his client's freedom in a manner contrary to the principles of fundamental justice in that it creates a presumption unfavourable to his client. In counsel's view, this presumption was likely to result in the complaint being upheld and, as he put it, in an almost automatic conviction if he does not raise any defence thereto.

Counsel argued first that, since a violation of the Code could, under section 101(2), also give rise to criminal proceedings, the presumption created by section 98(4) constituted an even greater violation of his client's freedom. Section 101(2) provides:

"101.(2) Subject to section 100, every employer or trade union who or that contravenes or fails to comply with any provision of this Part other than section 50, 94 or 95 is guilty of an offence and liable on summary conviction to a fine not exceeding ten thousand dollars."

However, counsel withdrew this argument when the Board called his attention to the fact that this section contained an exception that applied specifically to section 94 of the Code.

Counsel concluded that the very existence of section 98(4) constitutes a violation of Larose-Paquette's freedom since its effect comes automatically into play when a complaint is filed. He relied on R.L. Crain Inc. et al. v. Couture et al. (1983), 6 D.L.R. (4th) 478 (Sask Q.B.).

When asked to shed light on his statement concerning the alleged violation of his client's freedom, counsel replied that he did not have any evidence to submit since his arguments were strictly legal in nature.

Regarding section 15 of the Charter, the purpose of which "is to ensure equality in the formulation and application of the law" (Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, page 171), section 98(4) would violate it by creating a distinction in the treatment of certain respondents, such distinction exclusively affecting employers. This distinction would constitute discrimination

within the meaning given to this expression by the Supreme Court in Andrews, supra.

In his view, although his client was a corporation, it could nevertheless rely on the Charter. He referred us to Her Majesty the Queen v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, and asked the Board to reconsider and set aside the decision in Maritime Employers' Association (1987), 69 D.L.R. 41; and 17 CLRBR (NS) 355 (CLRB no. 617). In that decision the Board held that a corporation could not rely on section 15 of the Charter. Without deciding the issue, it expressed the view that the presumption in section 98(4) was not a violation of section 15 of the Charter.

2. Complainant's Reply

In reply, counsel for the complainant merely stated the fact that, being a corporation, the respondent, Larose-Paquette Autobus Inc., could not invoke section 7 or section 15 of the Charter.

He relied first on the Supreme Court judgment in Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927. Second he relied on the Board's decision in Maritime Employers' Association, supra. To further support his argument, he referred us to the position of the Federal Court of Appeal in Smith, Kline & French Laboratories Ltd. v. Canada (Attorney General), [1987] 2 F.C. 359, which affirmed the judgment of Mr. Justice Strayer of the Trial Division in Smith, Kline & French Laboratories Limited v. Attorney General of Canada, [1986] 1 F.C. 274.

In the view of counsel for the complainant, this lack of standing of the respondent to raise the point would by itself justify us in dismissing the employer's argument without further ado.

IV

THE DECISION

In Maritime Employers' Association, supra, the Board held that a corporation could not invoke section 15 of the Charter. The purpose of this provision is to avoid making distinctions in the treatment of groups or individuals for reasons relating to the personal characteristics of a person or group of persons and thus of individuals. It is accordingly not available to corporations. Moreover, the Board said that section 15 was not infringed by section 98(4) of the Code since it did not create such inadmissible distinctions:

"... we reject the argument that section 15 can negate the effect that section 188(3) [now section 98(4)] of the Code has on the burden of proof. It is clear that an employee who brings an unfair labour practice complaint under section 184(3) [now section 94(3)] against his employer does not have the same burden of proof as he faces when he brings a similar complaint against his union. Once again, the difference in treatment is attributable not to the person of the complainant, but to the status of the party against whom he brings his complaint. The individual characteristics in no way influence the burden of proof that he will have to discharge. This also holds true for the opposing party.

It is clear from all this that section 15 of the Charter, which prohibits discrimination based on personal characteristics, has no application in such cases:

'... Without attempting an exhaustive definition, I would say that the essence of discrimination for the present purpose is the drawing of an irrational distinction between people based on some irrelevant personal characteristic for the purpose, or having the effect, of imposing on certain of them a penalty, disadvantage or indignity, or denying them an advantage. ...'

(Re Andrews and Law Society of British Columbia (1985), 22 D.L.R. (4th) 9, page 16; emphasis added)"

(Maritime Employers' Association, supra, pages 58; and 374)

Later, in Frederick Transport Limited (1988), 73 di 33; and 88 CLLC 16,021 (CLRB no. 674), the Board reiterated its position and also held in very detailed reasons that section 98(4) did not violate section 7 of the Charter. No argument made in the instant case would justify our questioning the conclusions reached by the Board in earlier decisions. The employer will not be surprised by this since it had already unsuccessfully raised this argument in extremis in Larose-Paquette Autobus Inc. (1990), as yet unreported CLRB decision no. 792.

What is the situation with a corporation's right to invoke section 7 of the Charter? This question was also clearly decided by the Supreme Court in Irwin Toy, supra: only individuals may avail themselves of that right. The Court also held in this judgment that Big M Drug Mart Ltd, supra, did not apply when no criminal proceedings were under way in the case:

"In order to put forward s. 7 argument in a case of this kind where the officers of the corporation are not named as parties to the proceedings, the corporation would have to urge that its own life, liberty or security of the person was being deprived in a manner not in accordance with the principles of fundamental justice. In our opinion, a corporation cannot avail itself of the protection offered by s. 7 of the Charter. First, we would have to conceive of a manner in which a corporation could be deprived of its 'life, liberty or security of the person'. We have already noted that it is nonsensical to speak of a corporation being put in jail. ... The only remaining argument is that corporations are protected against deprivations of some sort of 'economic liberty'.

There are several reasons why we are of the view that this argument can not succeed. It is useful to reproduce s. 7, which reads as follows:

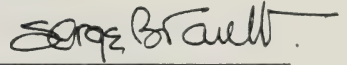
'7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.'

What is immediately striking about this section is the inclusion of 'security of the person' as opposed to 'property'. This stands in contrast to the classic liberal formulation, adopted, for example, in the Fifth and Fourteenth Amendments in the American Bill of Rights, which provide that no person shall be deprived 'of life, liberty or property, without due process of law'. The intentional exclusion of property from s. 7, and the substitution therefor of 'security of the person' has, in our estimation, a dual effect. First, it leads to a general inference that economic rights as generally encompassed by the term 'property' are not within the perimeters of the s. 7 guarantee. This is not to declare, however, that no right with an economic component can fall within 'security of the person'. Lower courts have found that the rubric of 'economic rights' embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property - contract rights. To exclude all of these at this early moment in the history of Charter interpretation seems to us to be precipitous. We do not, at this moment, choose to pronounce upon whether those economic rights fundamental to human life or survival are to be treated as though they are of the same ilk as corporate-commercial economic rights. In so stating, we find the second effect of the inclusion of 'security of the person' to be that a corporation's economic rights find no constitutional protection in that section.

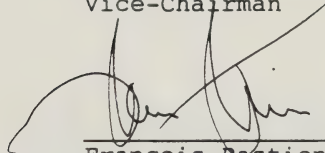
That is, read as a whole, it appears to us that this section was intended to confer protection on a singularly human level. A plain, common sense reading of the phrase 'Everyone has the right to life, liberty and security of the person' serves to underline the human element involved; only human beings can enjoy these rights. 'Everyone' then, must be read in light of the rest of the section and defined to exclude corporations and other artificial entities incapable of enjoying life, liberty or security of the person, and include only human beings. In this regard, the case of Big M Drug Mart, supra, is of no application. There are no penal proceedings pending in the case at hand, so the principle articulated in Big M Drug Mart is not involved."

(Irwin Toy, supra, pages 1002-1004)

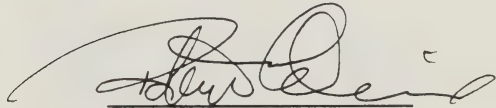
For all these reasons, the objection raised by the employer is dismissed. The Board will hold a hearing on the merits in accordance with the rule set out in section 98(4) of the Code and it will let the parties know as soon as possible when the hearing will be held.



Serge Brault
Vice-Chairman



François Bastien
Member



Robert Cadieux
Member

DATED at OTTAWA, this 30th day of July 1990.

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Summary

Résumé de décision

AMBER HOCKIN-JEFFERSON,
APPLICANT, WORLDWAYS CANADA
LIMITED, EMPLOYER, AND
TRANSPORT CANADA, INTERESTED
PARTY.

AMBER HOCKIN-JEFFERSON,
REQUÉRANTE, WORLDWAYS
CANADA LIMITED, EMPLOYEUR, ET
TRANSPORTS CANADA, PARTIE
INTÉRESSÉE.

Board File: 950-148

Dossier du Conseil: 950-148

Decision No.: 816

Décision n°: 816

This case deals with a referral of a safety officer's decision to the Board under section 129(5) of the Canada Labour Code (Part II - Occupational Safety and Health).

Il s'agit d'un renvoi au Conseil d'une décision d'un agent de sécurité, aux termes du paragraphe 129(5) du Code canadien du travail (Partie II - Sécurité et santé au travail).

The matter was referred to the Board by a flight attendant who had refused to work because of her concerns that service carts being used by the company without a second actuator linked to the brakes, could cause potential danger to a flight attendant or a passenger. A safety officer from Transport Canada found that such a situation did not constitute danger.

L'affaire a été renvoyée au Conseil par une agente de bord qui a refusé de travailler en raison de ses préoccupations à l'égard des chariots qu'utilise la compagnie. Les freins de ces chariots ne sont pas munis d'un deuxième régulateur de vitesse, ce qui pourrait, selon elle, présenter un danger pour un agent de bord ou un passager. Un agent de sécurité de Transports Canada a jugé que cette situation ne constituait pas un danger.

Upon hearing evidence, the Board determined that it was satisfied with the safety officer's finding and upheld the decision.

Après avoir entendu la preuve, le Conseil a jugé que les conclusions de l'agent de sécurité étaient satisfaisantes, et il a confirmé la décision de celui-ci.



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Reasons for Decision

Amber Hockin-Jefferson,
applicant,
and
Worldways Canada Limited,
employer,
and
Transport Canada,
interested party.

Board File: 950-148

The Board was comprised of Ms. Linda M. Parsons, sitting as a single member quorum pursuant to section 156 of the Canada Labour Code (Part II - Occupational Safety and Health).

APPEARANCES:

Mr. Peter Douglas, Representative, CUPE Airline Division, for the complainant;

Mr. Frank van der Staay, Manager, Standards and Procedures, Inflight Services, and Ms. Kallin L. March, Assistant Manager of Recruiting and Training, for the employer; and

Messrs. Howard G. Carter and Ian G. Shimmin, Safety Officers - Aviation Occupational Safety and Health.

I

These reasons deal with a referral to the Board under section 129(5) of the Canada Labour Code (Part II - Occupational Safety and Health) of a safety officer's

decision. The referral arose from a refusal to work by Ms. Amber Hockin-Jefferson on December 29, 1989 and a subsequent investigation by safety officers O.W. Binder and I.Q. Shimmin who found that the circumstances surrounding the refusal to work at the time did not constitute danger within the meaning of Part II of the Code. Ms. Hockin-Jefferson then requested that the safety officer's decision be referred to the Board pursuant to section 129(5) of the Code:

"129.(5) Where a safety officer decides that the use or operation of a machine or thing does not constitute a danger to an employee or that a condition does not exist in a place that constitutes a danger to an employee, an employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing or to work in that place, but the employee may, by notice in writing given within seven days of receiving notice of the decision of a safety officer, require the safety officer to refer his decision to the Board, and thereupon the safety officer shall refer the decision to the Board."

The Board received the referral on April 29, 1990 and a hearing was held in Toronto on June 6, 1990.

II

The events giving rise to this referral initially started on December 13, 1989 when Ms. Hockin-Jefferson was working as a flight attendant aboard an L1011 from Toronto to London Gatwick Airport. During this flight, the complainant noted service carts that had no brakes, broken brakes and ripped siding, as per Worldways policy and tagged them with "unserviceable tags" accordingly.

Upon landing at their destination, the door to the

right-hand side elevator came open and the service cart that was supposedly locked came out of the elevator and slammed into the bulkhead about five feet from the elevators. The cart apparently came to rest with the brake still locked.

Ms. Hockin-Jefferson exercised her right to refuse to work on December 29, 1989 while operating a flight from Toronto to Holgum, Cuba, because she had discovered that the same carts she had tagged on the December 13 flight were still being used and that some had had a braking system totally removed from one side of the carts and others had no brakes or brakes that still allowed the user to drag the cart down the aisle with little effort with the brake still engaged.

The complainant reported this to her inflight service manager who was to relay the information to her supervisors. Ms. Hockin-Jefferson also requested that a safety officer be called in to investigate the situation. Air worthiness inspector Brian Dobson and safety officers Oskar Binder and Ian Shimmin were assigned to investigate. The situation apparently continued to exist into the month of January when upon reporting to the aircraft and after doing the pre-departure inspection, the complainant continued to exercise her right to refuse to work and requested that the carts be replaced or fixed.

Mr. Shimmin wrote to Ms. Hockin-Jefferson on February 27, 1990 outlining their investigation and concluded by saying:

"As Worldways has given the Safety Officers assurance of voluntary compliance as to the cart repairs, and this has been confirmed by an inspection, there is no need at this time to the continuance of work refusal."

Ms. Hockin-Jefferson is appealing this decision before the Board.

III

Section 130 of the Code outlines the Board's powers and duties in referral situations:

"130.(1) Where a decision of a safety officer is referred to the Board pursuant to subsection 129(5), the Board shall, without delay and in a summary way, inquire into the circumstances of the decision and the reasons therefor and may

(a) confirm the decision; or

(b) give any direction that it considers appropriate in respect of the machine, thing or place in respect of which the decision was made that a safety officer is required or entitled to give under subsection 145(2).

(2) Where the Board gives a direction under subsection (1), it shall cause to be affixed to or near the machine, thing or place in respect of which the direction is given a notice in the form approved by the Minister, and no person shall remove the notice unless authorized by a safety officer or the Board.

(3) Where the Board directs, pursuant to subsection (1), that a machine, thing or place not be used until its directions are complied with, the employer shall discontinue the use thereof, and no person shall use such machine, thing or place until the directions are complied with, but nothing in this subsection prevents the doing of anything necessary for the proper compliance therewith."

In an effort to understand the investigation carried out by the safety officer and to determine if the conclusions reached were supportable, the Board asked

Transport Canada to produce evidence.

Ian Shimmin, safety officer of Aviation Occupational Safety and Health, told the Board that once he had been called in to investigate, he talked to the complainant, following which he and another safety officer, Oskar Binder, inspected the service carts on board an L1011 aircraft. Both officers in fact travelled to Santo Domingo on this aircraft to scrutinize the carts while in service. Several carts were found to be defective, removed from service and replaced. At this time, Mr. Da Silva, manager of Recruiting and Training, verbally assured the officers that the condition of the carts would be looked into. A meeting was arranged for February 22, 1990 at which time Transport Canada visited Worldways' premises and conducted a follow-up check. Mr. Da Silva demonstrated how the repairs were being effected. It was revealed that the problem was not the carts themselves but the mushroom attached to the base of the cart. Upon examining the base of the carts and the storage chambers, Worldways discovered that the gap between the head lips which restrain the mushroom was too wide, obviously worn down with use or else not an adequate fit, thus enabling the cart to slip off with ease.

At the same time, it was also discovered that the nylon-based brakes had worn smooth thus enabling the cart to slide along the carpet. Mr. Da Silva assured Transport Canada that these problems would be corrected and, in fact, they had already started to replace the worn mushrooms on some carts. Mr. Da Silva advised Transport

Canada that completing the task would take some time because carts were in service aboard various aircraft or else being serviced by Cara Food Service. Worldways had to wait for these carts to complete their cycle before it could finalize all repairs.

In terms of the removal of the secondary controls or actuators used for the securement of the brakes, it was determined by Transport Canada that it was a secondary control for the brake that had been removed and not the brake itself. Concerning this portion of the complaint, Mr. Shimmin wrote in his report of February 27, 1990:

"... As there are no standards for the construction of the carts, some manufacturers make the carts with only one set of braking controls. This removal therefore in no way decreases the safety of the cart."

IV

At the beginning of the hearing, the Board was advised by the complainant that the issue of unserviceable carts with faulty mushrooms was no longer of concern to her as the situation had been rectified.

Therefore, the only area to be dealt with by the Board was the removal of the actuator mechanism on the brake. Each cart sports two actuators - one on each side of the cart which may be activated from either end of the cart by foot controls. As some flight attendants were experiencing difficulty with manoeuvring the carts into certain storage areas due to the fact that the foot controls extend beyond the length of the carts, it was decided to remove the foot control at one end of the

cart to facilitate movement.

Mr. Shimmin relied on the input of Jackie Braderlow, regional superintendent of Passenger Safety, Air Carrier Operations, Ontario Region, Transport Canada, who wrote to him on April 24, 1990:

"... This in no way effects the breaking system as this can be controlled by the foot controls still in place. The onus is put on the cabin attendant to ensure that they are operating the trolley from the end where the foot controls are located so that they can engage the break when required. The majority of the time, two cabin attendants are working with a cart so this is not considered a problem.

The removal of the one set of foot controls has not compromised the efficiency of the break system as this remains unaffected. The system works as is intended by the manufacturer and if maintained as is required, the breaking system is considered reliable.

[sic]"

To facilitate this change, the operative handle was painted red so that a flight attendant could identify the side on which the actuator was located. In the event cabin personnel were servicing from a cart alone, they could ensure that they were positioned on the actuator side.

Ms. Hockin-Jefferson feared the potential danger to passengers or crew created by a runaway cart. She told the Board that there has been a history of brakes failing on these carts and flight attendants have always depended on the back-up pedal on the other side. She added that both union and management along with the Safety Committee have been for quite some time trying to rectify the cart situation and felt that the company was

stalling.

V

Realistically, one must look at the complainant's original refusal. She admits her concern with unserviceable carts has been put to rest.

The interesting thing to note is that the next refusal really attached itself to the removal of the actuators. Somewhat of a snowball effect. But nonetheless the safety officer did investigate the incident and concluded that "danger" did not exist as defined in the Code:

" 'danger' means any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected."

The objective of Part II is to minimize exposure to danger, thereby reducing the risk of occupational injury. Naturally, one may assume that danger exists in one form or another in most occupations and may indeed vary depending on the industry. Safety officers are called in at crucial moments to assess situations that may appear to employees to be dangerous. It should be noted here that for the purposes of the aviation industry, safety officers from Transport Canada are considered to be safety officers as contemplated by the Code pursuant to an agreement between Transport Canada and Labour Canada.

In the case at hand, the safety officer from Transport Canada did investigate the situation and found that no danger, as intended by the Code, existed. It is interesting to note here that Transport Canada found itself to be operating in a somewhat "grey" area. The standards under which they operate apparently cover only situations where an apparatus is attached. Thus Transport Canada found it has jurisdiction to investigate unserviceable carts that are housed in the storage compartments and attached. However, once the carts are in service, moving through the aisles of the aircraft, Transport Canada is unsure as to whether or not it is in its bailiwick. Nonetheless, it did investigate and prepared its decision because somebody had to do so.

I must add here that any concern Ms. Hockin-Jefferson may have had for the safety of the passengers vis-à-vis a potential runaway cart is not applicable under Part II of the Code. Strange as this may appear, section 128 of the Code, which gives employees the right to refuse, restricts the object of the concern for danger to the employee or to another employee.

I acknowledge that Ms. Hockin-Jefferson was refusing also because of safety concerns for herself and her crew members; however, such concern, as she told the Board, was not new. Discussions about the problem carts have been ongoing for some time, but the employer and the union have not managed to reach a solution.

In Monica McHugh and Natalie Garon (1989), as yet unreported CLRB decision no. 743, the Board wrote:

"... The safety provisions in the Code are intended to ensure that employers provide safe workplaces in terms of equipment and environment. The right to refuse is designed to be used in situations where employees are faced with immediate danger when injury is likely to occur right there and then if the danger is not removed. It is not meant to be used to bring ongoing disputes to a head (see William Gullivan [(1981), 45 di 180; and [1982] 1 Can LRBR 241 (CLRB no. 332)]."

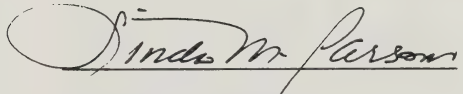
(page 15)

I recognize it must be terribly frustrating for the union in their ongoing battle to ensure that only serviceable carts are used. And yes, it did take Ms. Hockin-Jefferson's refusal to act as catalyst to get the unserviceable carts repaired. Much to her credit, Ms. Hockin-Jefferson is trying to guarantee a safe workplace for all. But the newly identified brake actuator situation has been found to not constitute danger under the Code. It may be a nuisance for the flight attendants and awkward to handle, but clearly it is a problem for further discussion with the employer and not something that this Board can change.

While I may be able to sympathize with Ms. Hockin-Jefferson's concerns, I cannot find any reason to overturn the safety officer's decision. Evidence was proffered by Transport Canada that many airlines utilize on a daily basis service carts with only one actuator or none at all. This standard has been accepted and functional within the airline industry for some time and

without incident. The safety officer concluded that the present situation in no way decreases the safety of the cart, and I was not offered any proof that would warrant a different conclusion.

The safety officer's decision is therefore confirmed.

A handwritten signature in cursive script, reading "Linda M. Parsons", written over a horizontal line.

Linda M. Parsons
Member of the Board

ISSUED at Ottawa this 31st day of July, 1990.

information

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Summary

AMALGAMATED CLOTHING AND TEXTILE
WORKERS UNION, LOCAL 459, ON BEHALF
OF LAURRIE GRAHAM, COMPLAINANT, AND
KLEYSEN TRANSPORT LTD., RESPONDENT.

Board File: 745-3668

Decision No.: 817

These reasons deal with a complaint
alleging that Kleysen Transport Ltd.
had violated section 94(3)(a)(i) of
the Code by terminating its
owner/operator relationship with
Laurrie Graham for having participated
in union activities and because his
wife was the union organizer who was
directing an organizing drive amongst
the owner/operators working for
Kleysen.

This complaint was dismissed.
Notwithstanding that the employer's
actions had been taken against Laurrie
Graham at a time and in circumstances
which raised suspicions as to whether
there were anti-union motives, the
Board found that the employer had
discharged its onus under section
98(4) by calling strong evidence to
refute the allegations.

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peuvent être utilisés à des fins
juridiques.

Résumé de Décision

LES TRAVAILLEURS AMALGAMÉS DU VÊTEMENT
ET DU TEXTILE, SECTION LOCALE 459, AU
NOM DE LAURRIE GRAHAM, PLAIGNANT, ET
KLEYSEN TRANSPORT LTD., INTIMÉE.

Dossier du Conseil: 745-3668

N° de Décision: 817

Les motifs qui suivent portent sur une
plainte alléguant que Kleysen
Transport Ltd. a enfreint le sous-
alinéa 94(3)(a)(i) du Code en mettant
fin à sa relation de travail avec
Laurrie Graham, propriétaire-
exploitant, parce que ce dernier avait
pris part à des activités syndicales
et que sa femme était recruteur
syndical auprès des propriétaires-
exploitants à l'emploi de Kleysen.

La plainte a été rejetée. Peu importe
que l'employeur ait pris des mesures
à l'égard de Laurrie Graham à un
moment et dans des circonstances qui
auraient pu soulevé des doutes quant
à l'existence de motifs antisyndicaux,
le Conseil a jugé que l'employeur
s'était déchargé du fardeau prévu au
paragraphe 98(4) en présentant des
éléments de preuve solides pour
réfuter les allégations.



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Reasons for decision

Amalgamated Clothing and Textile
Workers Union, Local 459, on
behalf of Laurrie Graham,

complainant,

and

Kleysen Transport Ltd.,

respondent.

Board File: 745-3668

The Board was composed of Vice-Chairman Hugh R. Jamieson
and Members Evelyn Bourassa and J.-Jacques Alary.

The reasons for this decision were written by Vice-
Chairman Hugh R. Jamieson.

Appearances:

William M. Sumerlus, for the complainant; and
Denis W. Hayes, Q.C., for the respondent.

I

These reasons deal with a complaint alleging that Kleysen
Transport Ltd. (the employer) had terminated the
employment of Mr. Laurrie Graham contrary to section
94(3)(a)(i) of the Canada Labour Code (Part I -
Industrial Relations):

*"94.(3) No employer or person acting on
behalf of an employer shall*

*(a) refuse to employ or to continue to employ
or suspend, transfer, lay off or otherwise
discriminate against any person with respect
to employment, pay or any other term or
condition of employment or intimidate,
threaten or otherwise discipline any person,
because the person*

*(i) is or proposes to become, or seeks
to induce any other person to
become, a member, officer or
representative of a trade union or
participates in the promotion,
formation or administration of a
trade union,"*

The Amalgamated Clothing and Textile Workers Union, Local 459 (the union) referred to several other sections of the Code in the complaint which was filed with the Board on June 13, 1990; however, section 94(3)(a)(i) is the relevant section considering the circumstances complained of.

In keeping with the Board's practice of treating matters which involve loss of employment as "priority complaints" a hearing was conducted into this complaint at Winnipeg on July 23 and 24, 1990.

II

Laurrie Graham has had an "owner/operator" relationship with the employer for some sixteen years. As an owner/operator Mr. Graham operates a tractor which is owned by him under the employer's name and colours. The actual contract to which Mr. Graham is party to with the employer was not placed before the Board in these proceedings and, notwithstanding that the employer has raised the issue of whether owner/operators are employees within the meaning of the Code in a related application for certification (Board file 555-3138) which was filed by the union and is pending before the Board, the employer did not, for the purposes of this complaint, take any position regarding the employee status of Laurrie Graham. In a direct question from the Board at the outset of the hearing on July 23, 1990, counsel for the employer confirmed that he was not raising this issue in these proceedings.

Having referred to the application for certification which was filed by the union on June 8, 1990, it is useful to point out that the union had commenced its organizing campaign amongst the

employees of the employer on or about April 13, 1990. The organizer for the union was Mrs. Karen Graham, wife of Laurie Graham. On or about April 13, 1990, Laurie Graham had become a member of the union and had participated in the promotion of the union amidst the other owner/operators working with the employer.

The employer is an inter-provincial and international trucking company with operations in most regions of Canada. Its line-haul routes stretch into almost all of the United States. To maintain its running-rights in the U.S.A., the employer must comply with certain regulations of the Department of Transport (DOT) and with standards set by the Interstate Commerce Commission (ICC). This includes health and safety of drivers who must pass a medical examination as well as a written test which is primarily related to safety. According to the employer, non-compliance could jeopardize its running rights in the U.S.A.

Prior to and including late 1989 the employer only required drivers who operated in its name in the U.S.A. to pass the DOT tests; however, following an audit around that time where doubts were raised about its drivers' qualifications vis-à-vis operating in the States, the employer decided to have all its drivers qualify under the DOT standards.

Laurie Graham, who operated exclusively in Canada and had not previously been required to pass the DOT tests, was asked for the first time in January 1990 to pass a medical and to take the written exams. According to Mr. Al Kirsch, a personnel supervisor with the employer, Laurie Graham was given the relevant forms and manuals and was directed to obtain the required qualifications as soon as possible.

In April 1990 the employer decided to alter some of the conditions in its owner/operator contracts. This necessitated

communicating with some two hundred and ten owner/operators across Canada. To this end the employer sent the following letter dated April 4, 1990 to all of its owner/operators:

"Dear Sirs:

In response to many discussions that we have had with our owner/operators and in response to the changing business environment within the transport industry, this is to advise that we have formulated a number of changes to the agreement between you and Kleysen Transport Ltd.

The principal changes in the agreement are in the areas of haulage rates and insurance premiums and deductible.

Therefore, in accordance with the terms of our agreement you are hereby given notice that the said agreement shall terminate on the 13th day of May, 1990. Revised copies of the new contract will be available for your review on April 15, 1990. At that time we hope that you will contact your Personnel Supervisor or Terminal Manager to review and sign the new contract so that your association with the company may continue without interruption.

If you have entered into more than one agreement with the Company, this notice applies to all.

Yours truly,

KLEYSEN TRANSPORT LTD.,

*W.G. Prevalnig
Executive Vice-President,
Corporate Resources."*

A copy of this letter was forwarded to Laurie Graham by registered mail; however, he did not pick it up at the post office despite the usual notices from Canada Post. The Board heard much about this failure to pick up his mail at the hearing but little importance need be attached to this fact as it became clear that Laurie Graham was fully aware some time in April 1990 of the need to enter into a new contract with the employer by May 13, 1990.

As the May 13, 1990 date drew near when the old contracts were to expire the employer began to take notice of who had accepted the new contracts and who had not. According to the testimony of Mr.

Kirsch there were only some twelve or thirteen owner/operators who had neither signed or indicated their intention to sign the new contract by the end of the first week of May. Using its practice of communicating with its line-haul operators through its computerized dispatch system, these twelve or thirteen persons were reminded about the need to sign the new contract. Dispatcher Roger Sabourin testified that he had reminded Laurie Graham.

Mr. Kirsch was also aware at this time that Laurie Graham had not yet acquired his DOT qualifications that he had been told to obtain in January 1990. Using its computerized dispatch system again, Laurie Graham was informed that he was to be grounded until he had obtained these qualifications. This practice of "grounding" is the employer's method of controlling delinquencies amongst its line-haul operators. When a violation of the rules occurs, such as delinquent logs come to the employer's attention, an entry is placed in the computer against the operator's name. Whenever a dispatcher deals with this operator the computer raises a flashing warning that a violation is indicated against this particular operator. The dispatcher so notifies the operator who is then required to contact the appropriate management person to rectify the violation. This violation caution remains on the computer for fourteen days whereafter, should the violation continue, dispatchers cannot assign work to the operator. Al Kirsch told the Board that he had placed Laurie Graham in the computer violation system on or about May 14, 1990 because of his failure to obtain his DOT qualifications. Dispatcher Roger Sabourin testified that he had informed Laurie Graham of the potential grounding and the reasons therefor. Mr. Sabourin also said he told Laurie Graham that he had to contact Al Kirsch immediately.

In the meantime, all of the foregoing was brought to the attention of Mr. James Ballard, the employer's Personnel Manager, who is ultimately responsible for the contractual relationship with owner/operators. Mr. Kirsch had kept Mr. Ballard up to date on the situation regarding the signing of the new contracts as well as Laurie Graham's failure to obtain the DOT medical examination or to take the written examination. According to Mr. Ballard, as of May 26, 1990, what he was aware of was that Laurie Graham had not signed the new contract nor had he indicated any intention to sign it. Also, for some four months he had been delinquent in obtaining the DOT qualifications. Further, in spite of the notification through dispatcher Roger Sabourin, Laurie Graham had not contacted Al Kirsch.

Mr. Ballard told the Board that between May 26 and 28, 1990, he decided to take the matter to Vice-President Mr. Walter Prevalnig with a recommendation that Laurie Graham's relationship with the employer be terminated. In response to a question from the Board, Mr. Ballard admitted that he was aware at that time through rumors that the union was organizing the owner/operators and that Laurie Graham's wife Karen was the organizer. Mr. Ballard said that this knowledge had no impact on his decision to terminate Laurie Graham. In fact, he did not pass this knowledge to Mr. Prevalnig when he sought authority to let Graham go.

Mr. Walter Prevalnig, the employer's Vice-President of Corporate Resources, testified that he had developed a practice of avoiding names when his management team approached him for permission to terminate someone's employment. Mr. Prevalnig said that there were many relatives of management persons on staff and he thought that it avoided favouritism if he only knew the circumstances and not the person's name. So it was with Laurie Graham. Mr. Prevalnig said he was told by Mr. Ballard about the owner/operator who had failed to obtain the DOT qualifications

since January 1990 and that this same person had not signed the new owner/operator contract or even indicated his intentions whether he would sign or not. It was Mr. Prevalnig's opinion that there was no room in the employer's organization for someone who neglected his responsibilities like Graham had been doing. Indeed, it was Mr. Prevalnig's view that Laurie Graham was an independent business person and he treated him as such when he gave the authority to withdraw the contract offer to Laurie Graham. Laurie Graham was notified of this decision to terminate his contractual relationship with the employer on June 1, 1990.

III

Laurie Graham's version of the circumstances was understandably different from those related by the employer. Referring to the DOT qualifications, he admitted being told by Al Kirsch that he had to obtain them in January 1990. However, he testified that shortly thereafter he had spoken to a Mr. Emelio Tacchi, the employer's Central Dispatch Manager, who had informed him that there was no need for him to be qualified to go into the U.S.A. when he was never required to do so. (Mr. Tacchi denied this later in rebuttal evidence).

Mr. Graham also told the Board that he became aware of the new owner/operator contracts when he saw a notice at the Edmonton Depot which set a deadline for Alberta owner/operators to comply. He thought this was early in May 1990. What Laurie Graham failed to disclose was that he had received a copy of his new contract with his pay-cheque dated April 25, 1990. This came to light through the evidence of his wife Karen Graham. In any event, Laurie Graham said that he had informed dispatcher Roger Sabourin that he intended to sign the contract on several occasions. (Mr. Sabourin denied this). Further, Laurie Graham

said that he was about to come in to sign the contract and obtain his medical on or about May 22, however, Roger Sabourin had dispatched him on an urgent run saying that he (Sabourin) would look after the delay in signing the contract. (Mr. Sabourin also denied this although he did remember the emergency dispatch).

On May 28, 1990, when he had actually been grounded, Laurie Graham went to see Al Kirsch to sign the contract. He was told that he could not so do until he had his DOT medical and written examination. That very day he went for his medical but had not received the required papers until after June 1, 1990 when the contract offer was withdrawn. The written examination which was produced to the Board was dated May 30, 1990.

The union took the position that all of the circumstances can only point to one conclusion and that is that the employer terminated Laurie Graham because of its knowledge of his union activities and also because his wife Karen Graham was organizing the owner/operators. Counsel for the union pointed out that it was the practice of the employer in the past to provide an opportunity to persons who were in violation of the rules to correct the situation during the fourteen-day grace period when they are computer-grounded. The fact that Laurie Graham was treated differently is grounds enough for the Board to draw the inference that the real cause for dismissal was not the delay in obtaining the DOT qualifications nor the late offer to sign the new owner/operator contract. Such a sudden shift in practice, the union argued, could only point to union activities as being the true underlying influence for the employer's decision to withdraw the contract offer for Laurie Graham. The union also directed the Board's attention to Mr. Graham's past work record which had been impeccable for sixteen years. Why the sudden change in attitude towards him at a time when the union organizing was in full swing?

IV

In a recent decision, Office and Technical Employees' Union Local 15, on behalf of Michael Cooper (1990), unreported Board decision no. 775 at pages 5-6, the Board reviewed its approach to complaints under section 94(3)(a)(i) of the Code:

"In this type of complaint there is seldom direct evidence showing that an employer's actions are motivated by anti-union sentiments. The only party that usually has knowledge of why certain actions were taken is the employer itself. For these reasons the burden of proof is shifted to the employer by section 98(4) so that it is the employer who must satisfy the Board that its conduct was not anti-union motivated:

'98.(4) Where a complaint is made in writing pursuant to section 97 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 94(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party.'

The Board's approach to complaints under section 94(3)(a)(i) has been well documented. Anti-union motives need only be a proximate cause for employer action to be found to be a violation of section 94(3)(a)(i) of the Code. This policy was summarized by the Board in Air Atlantic Limited (1986), 68 di 30; and 87 CLLC 16,002 (CLRB no. 600):

'The law on the subject of discrimination against employees for having exercised rights under the Code is well settled. If a decision by an employer to take any of the actions described in section 184(3)(a) (now section 94(3)(a)) against an employee has been influenced in any way by the fact that the employee has, or is about to exercise rights under the Code then the employer's actions will be found to be contrary to the Code. Anti-union motives need only be a proximate cause for an employer's conduct to run afoul of the Code:

'It is a rare experience for labour relations boards to hear an employer who cannot advance a justification for his act - e.g. failure to report to work one day, an act of insubordination to a superior, or merely a re-evaluation of the employee's performance which showed he did not maintain the standard desired. They may be proper motivations for employer actions but

experience shows they are often relied upon around the time the employee is seeking to exercise or has exercised his right under section 110(1) (now section 8(1)).

To give substance to the policy of the legislation and properly protect the employee's right, an employer must not be permitted to achieve a discriminatory objective because he coupled his discriminatory motive with other non-discriminatory reasons for his act.

For these reasons, if an employer acts out of anti-union animus, even if it is an incidental reason, and his act is contemplated by section 184(3), he will be found to have committed an unfair labour practice.'

(Yellowknife District Hospital Society (1977), 20 di 281; 77 CLLC 16,083, at pages 284-285 and 16,549)

(Emphasis added)''

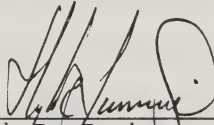
It can be seen from the foregoing that the Board takes its role very seriously when dealing with the protection afforded employees under section 94(3)(a)(i) and other sections of the Code where employers act to interfere with the rights of employees to freely select a bargaining agent and to participate in collective bargaining. (In this regard see also K.D. Marine Transport Ltd. (1982), 51 di 130; and 83 CLLC 16,009 (CLRB no. 400); Sedpex Inc. (1985), 63 di 102 (CLRB no. 543); and Canadian Imperial Bank of Commerce (1986), 65 di 1; 86 CLLC 16,023 (CLRB no. 564)). In these areas of employee freedoms the Board is quite prepared to act sheerly on inference. However, before the Board can find an employer to have contravened the Code, there has to be something from which the Board can draw the inference that anti-union motives played a part in the employer's actions. Moreover, even if there are circumstances prevailing which cast doubt on the employer's true motives, the employer always has the right and the opportunity to rebut the presumption which the Code imposes through section 98(4).

In the circumstances before us in this case there are some obvious coincidences which immediately raise suspicions of anti-union animus. These are of course the timing of the employer's decision to terminate Laurrie Graham vis-à-vis the union's organizing campaign, his past excellent work record, and the fact that his wife Karen was the publicly declared union organizer. Opportune as it may be for the Board to grasp these circumstances to infer anti-union animus as a proximate cause for the employer's actions, we are unable to do so in light of the strong evidence to the contrary presented by the employer. The testimonies of Mr. Ballard and Mr. Prevalnig, who actually made the decision to terminate Laurrie Graham, were particularly forthright and in our opinion beyond reproach.

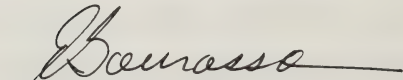
What the employer did here in response to the complaint and the union's allegations of anti-union animus was to present to the Board everyone who had anything to do with Laurrie Graham and his failure to enter into a new owner/operator contract and his delinquency in obtaining qualifications to operate in the U.S.A. as required by the employer. The union had the opportunity to cross-examine these witnesses and they were also there for the Board to question and to assess their credibility. Having listened carefully to all of the witnesses, both for the employer and for the union, the Board is of the opinion that Laurrie Graham was to a large extent the author of his own misfortune. One would have thought that in the circumstances where he was openly promoting the union and soliciting membership in the union amongst the other owner/operators Laurrie Graham would have ensured that his conduct regarding his work and his relationship with the employer would have been flawless, particularly so when his wife Karen was known to be directing the union's organizing campaign. But Mr. Graham did the opposite. He carelessly took no action to protect himself until it was too late. Despite the

notification by the dispatcher about the need to sign the new owner/operator contract and to get his medical and written examination in, he did neither until he was actually grounded. By that time, the decision had been taken by the employer to let him go. It may well be that the union has a point about the employer's past practice of allowing delinquent drivers to rectify their situation without terminating their contracts, but this would go to just cause dismissal procedures which may be valid in other forums. What this Board is looking for is whether the employer's actions were tainted by anti-union motives. In the circumstances we are content that the decision of the employer to withdraw the owner/operator contract offer from Laurie Graham some time between May 26 and June 1, 1990, was not so tainted and the complaint is dismissed accordingly.

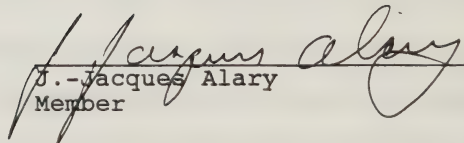
The foregoing is a unanimous decision of the Board.



Hugh R. Jamieson
Vice-Chairman



Evelyn Bourassa
Member



J.-Jacques Alary
Member

DATED at Ottawa this 7th day of August, 1990.

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Résumé de décision

L'UNION DES FACTEURS DU CANADA,
REQUÉRANTE, AINSI QUE LE SYNDICAT
DES POSTIERS DU CANADA ET LA SOCIÉTÉ
CANADIENNE DES POSTES, INTIMÉS.

Dossiers du Conseil: 530-1823
555-3088

N°. de Décision: 818

Summary

LETTER CARRIERS' UNION OF CANADA,
APPLICANT, AND THE CANADIAN UNION OF
POSTAL WORKERS AND THE CANADA POST
CORPORATION, RESPONDENTS.

Board Files: 530-1823
555-3088

Decision No.: 818

Demande d'accréditation visant à
fragmenter une unité de négociation
déjà accréditée. Fardeau de la
preuve imposé au requérant.

L'habilité à négocier se détermine
sur la foi d'arguments écrits.
Étude de la notion de viabilité
d'une unité de négociation.
Manquements au devoir de
représentation non pertinents.
Querelles intestines au sein des
syndicats non pertinentes.

En 1988, à la suite d'un scrutin, le
Conseil a accrédité le Syndicat des
postiers à l'égard d'une unité de
négociation regroupant quelque
40 000 employés des postes dont les
facteurs. Les dirigeants de l'Union
des facteurs du Canada sont demeurés
en fonction et ont quelques mois
plus tard présenté la demande. Le
Conseil a réaffirmé la règle de ne
pas fragmenter une unité accréditée
sauf pour des raisons très
convaincantes.

Le motif principal allégué est la
non-viabilité reliée à ses
allégations de mauvaise
représentation par le syndicat
accrédité. Aucune allégation ne
vise l'incapacité à conclure une
convention collective.

L'habilité à négocier s'évalue en
fonction d'une série de facteurs.
Aucun changement n'est survenu dans
l'exploitation de la Poste depuis
1987. Après analyse des faits, le
Conseil a jugé que le fractionnement
n'était pas justifié. Les reproches
faits concernent le choix de l'agent
négociateur et non la définition de
l'unité de négociation. Le critère
de la volonté des employés n'est pas
significatif si l'unité recherchée
n'est pas habile à négocier.

Le Conseil a déploré l'attitude des
dirigeants syndicaux et les invite
à mettre fin à leurs querelles.

This case deals with an application
for certification seeking to
fragment an already certified
bargaining unit. Onus of proof on
applicant.

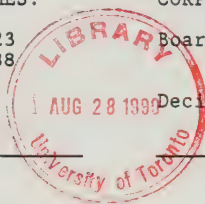
Appropriateness is determined on the
basis of written submissions. The
Board examined the concept of
viability of a bargaining unit.
Breaches of the duty of
representation are not relevant.
Internal disputes within the unions
are not relevant.

In 1988, following a vote, the Board
certified CUPW to represent a
bargaining unit consisting of some
40 000 postal employees, including
letter carriers. LCUC officers
remained in office and, a few months
later, filed this application. The
Board reaffirmed its rule not to
fragment a certified bargaining unit,
except for very convincing reasons.

The main reason alleged is the non-
viability linked to allegations of
breach of representation by the
certified union. No allegation
deals with the inability to enter
into a collective agreement.

Appropriateness is assessed
according to a series of factors.
No change occurred in the operation
of the postal system since 1987.
After examining the facts, the Board
concluded that fragmenting the unit
was not warranted. The criticisms
relate to the choice of bargaining
agent and not the definition of the
bargaining unit. The employee
wishes are not significant if the
unit sought is not appropriate.

The Board deplores the attitude of
the union officers and invites them
to put an end to their disputes.



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Canadien des
Relations du
Travail

Reasons for decision

Letter Carriers' Union
of Canada,

applicant,

Canadian Union of Postal
Workers, and Canada Post
Corporation,

respondents.

Board Files: 530-1823
555-3088

The Board was composed of Mr. Serge Brault, Vice-Chairman, and Ms. Ginette Gosselin and Mr. Michael Eayrs, Members.

Appearances:

Mr. Gaston Nadeau, for the Canadian Union of Postal Workers; Messrs. Robert Monette and Sean Kennedy, for Canada Post Corporation; and Messrs. James L. Shields and Phillip G. Hunt, for the Letter Carriers' Union of Canada.

These reasons for decision were written by Mr. Serge Brault, Vice-Chairman.

I

THE APPLICATION

This is further to an application for certification filed on March 1, 1990, by the Letter Carriers' Union of Canada (LCUC, the applicant or the Letter Carriers) with a view to representing certain employees of Canada Post Corporation (the employer or CPC) currently represented by the Canadian Union of Postal Workers (CUPW or the Postal Workers). LCUC's application, filed pursuant to section 24 of the Canada Labour Code (Part I - Industrial Relations), is not

an application to dislodge CUPW as the bargaining agent for the unit it currently represents. The application is also based on section 18 of the Code and seeks to split the existing unit into two parts: (1) postal workers and other operational employees (first-line supervisors, technicians, tradesmen); and (2) those employees LCUC has applied to represent, namely, letter carriers and mail service couriers. The current unit includes more than 45,000 employees, whereas the one sought by LCUC would comprise approximately 20,000.

Sections 18 and 24(1) of the Code read as follows:

"18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application.

...

24.(1) A trade union seeking to be certified as the bargaining agent for a unit that the trade union considers constitutes a unit appropriate for collective bargaining may, subject to this section and any regulations made by the Board under paragraph 15(e), apply to the Board for certification as the bargaining agent for the unit."

II

THE PROCEEDINGS

The applicant is seeking to have the Board amend the current description of the bargaining unit by substituting the following therefor:

"A unit comprised of those employees working in the postal operations group, in the operational category, who are engaged primarily in performing external mail collection and delivery services."

This unit appears identical in all respects with the one represented by LCUC until 1988.

The application reads as follows:

"9. ... the Applicant requests that the Board review the appropriateness of the bargaining unit.

GROUND'S FOR REVIEW

Since 1891 an employee organization representing employees engaged in the external distribution and pickup of mail has been in existence. The Applicant or its predecessors have always retained this jurisdiction except for two instances, which are more particularly detailed as follows: ..."

LCUC then reviews the background given in Canada Post Corporation (1988), 73 di 66; and 19 CLRBR (NS) 129 (CLRBR no. 675), of the Council of Postal Unions and recounts the certification of 1988. It continues:

"10. It is the position of the Applicant that events subsequent to the February 10, 1988 decision support its position that a single Bargaining Unit comprising all operational employees is not an appropriate Bargaining Unit. As a result the Applicant submits that it's [sic] application should be allowed on the following grounds:

(I) The single operational unit is not viable. The Applicant has evidence to show that the terms and conditions of employment, the rights and benefits negotiated in the collective agreement for the letter carriers and mail service couriers are being eroded and lost. It is impossible to satisfactorily organize and bargain for a unit of over 46,000 members which is comprised of two distinct subgroups possessing unique and distinct skills, job responsibilities, duties, conditions of employment and collective bargaining goals.

(II) The collective bargaining interests of the external employees cannot be served by the new single operational Unit with the result that the former external employees' rights under the collective agreement are not being satisfactorily represented against the employer.

The environment and framework of normal labour relations that were in place for the external employees are now impossible.

(III) ... the Board should enquire into the evidence of the inappropriateness and non-viability of the new single unit. The Board should have particular regard to the evidence

which was not led during the course of the proceedings leading up to the Board's decision of February 10, 1988. The evidence of the Applicant can be divided into the following categories ...

(i) ... the external employees do not have union stewards as provided for in the collective agreement. As a result these employees are denied the representation they are entitled to ...

(ii) In all the regions across Canada, locals established by the Applicant have been closed, particularly in those locations where there are no C.U.P.W. employees. In both these locations and other locations there are no consultation meetings being held as required by the collective agreement, ...

(iii) The collective agreement provides for the filling of what have become known as 'rehab' positions ... The procedures stipulated in this article for filling these positions have been amended and/or waived by both C.U.P.W. and C.P.C. ...

(iv) External employees in numerous postal stations across Canada are not having their grievances processed in accordance with the provisions of the collective agreement. ...

(v) The applicant has examples of hundreds of grievances that have not been filed in time ...

(vi) Articles 12 to 15 of the collective agreement provide for the restructuring of mail service courier and letter carrier routes respectively. ... Rights of the employees are being waived by both Canada Post and C.U.P.W.

(vii) Letter carriers and mail service couriers are not receiving satisfactory representation ...

(viii) During the current round of collective bargaining the unique interests of the mail service couriers and letter carriers are not being properly represented. ...

(ix) Former members of the applicant have attempted to participate in the Union activities of the respondent C.U.P.W. However, the applicant's constituents are discouraged from participating in local meetings. ...

(x) In the large centres of Toronto, Vancouver and Montreal the experience and ability of the members of the applicant to protect the employee's rights ... has been non-existent. For example in Montreal the C.U.P.W. local has refused to hold any election meetings. This persistent refusal is motivated by C.U.P.W.'s decision not to permit any former L.C.U.C. local officers or shop stewards to run for office. ...

(xi) The more than 3,000 letter carriers and mail service couriers represented by the Montreal C.U.P.W. local have repeatedly been denied any form of assistance ...

(xii) On a national basis the respondent, C.U.P.W., has required that all L.C.U.C. members who hold an elected office or wish to run for an elected office in C.U.P.W. must publicly denounce the L.C.U.C. by resigning from membership in the L.C.U.C. and signing disassociation commitments prior to being allowed into any meeting. ...

(xiii) All of this evidence is a strong indication of the severe problems associated with the creation of a single operational unit. The result is that the letter carriers and mail service couriers are suffering the consequences of this situation. Normal labour relations are now an impossibility because of the deep rifts that have been created in the new unit. In this short period of time it is evident that a single bargaining agent is not capable of properly representing all of the employees in this unit. The external employees represent close to half of the employees in the single unit and they are not being represented as they should be by a bargaining agent. ... This situation could not have been what the board intended in its decision of February 10, 1988 nor can it be a situation that the board can allow to continue.

(xiv) ... all of the events which have occurred since February 10, 1988 clearly indicate that the present bargaining unit structure is not appropriate for collective bargaining and that it threatens the rights of those employees who are letter carriers and mail service couriers and who are not receiving equal and fair representation ...

(xv) ... the proposed bargaining unit structure ... is compatible with the organization of work within the respondent, C.P.C. and will not impair the operations of the Corporation. ... [it would] eliminate the chaos which has resulted from the bargaining unit structure which is presently in place.

(xvi) ... the Board's policy in protecting the rights of the employees under the Canada Labour Code cannot be met in the current bargaining unit configuration ... The events after the decision demonstrate that the 'principle objective' [sic] of the Board has not been met. ..."

CUPW resolutely challenged all these assertions by LCUC, qualifying them first of all as inadmissible in law. Its preliminary objections were rejected by the Board following a hearing on May 15, 1990 (Canada Post Corporation (1990), as yet unreported CLRB decision no. 798).

In the same decision, however, the Board ordered the applicant to give particulars of its allegations, which the Board considered too vague. A formal request for particulars was submitted by CUPW on May 30.

A prehearing conference took place on June 21 between counsel for the parties and Mr. J.F.W. Weatherill, the Chairman of the Board, in preparation for the hearings originally scheduled for June 26. On that occasion, the Chairman informed the parties that a differently constituted panel would handle the continuation of the proceedings. The parties subsequently confirmed in writing that there was no objection to the change of panel. The Chairman also used the opportunity to offer to the parties his good offices and those of the Board to explore possible avenues toward a settlement. The parties subsequently had several private meetings with a labour relations officer and the Registrar of the Board, but to no avail. As is customary in such cases, our panel did not take part in these discussions.

On June 27, the Board convened another prehearing meeting:

"Further to the meeting held between representatives of the Canada Labour Relations Board and counsel for the parties on June 21, 1990, this will confirm that the hearing that had been scheduled to continue from June 26 to 29, 1990 will now be held on Wednesday, June 27 only, beginning at 10:00 a.m., and will take the form of a prehearing meeting of the Board panel with the parties' representatives.

On Tuesday, June 26, the parties will be asked to confer with Board officers with respect to alternative means, if any, of dealing with these matters. This meeting will also begin at 10:00 a.m. at the Board's offices in Ottawa. In this regard, it may be appropriate for counsel to be accompanied by authorized officials of their respective clients, in the event it is necessary to consult them.

At the Wednesday meeting, counsel will be expected to provide to the Board, in writing, the form and subject matter of the evidence they wish to adduce

before the Board, and the length of time in which they expect to do so. Counsel should here also be accompanied by authorized representatives of their respective clients, in the event it is necessary to consult them.

Hearing dates will not be set by the Board until after it has considered the representations of the parties on the matter and form in which evidence is to be adduced, and decided on which evidence, if any, will be deemed necessary in order to deal with these applications.

This will also confirm that Mr. J.F.W. Weatherill is being replaced as panel Chairman by Vice-Chairman Serge Brault. The Board expects that any submissions the parties may have on this matter will be made no later than Wednesday, June 27, 1990."

At the opening the parties stated that they were satisfied with the change in the composition of the panel. Mr. Shields elaborated on his document containing the clarifications ordered on May 15, while reserving the right to make further representations thereon.

The Board then questioned counsel on the evidence that they intended to adduce should the Board deem such evidence necessary. Mr. Shields stated that he planned to call 465 [sic] witnesses, while his confreres suggested intermediate means for disposing of the case, insisting the case must not drag on unduly.

After deliberation, the Board decided that, before allowing the parties to engage in a lengthy and possibly pointless exercise, it was appropriate to address the issue of the appropriateness for collective bargaining of the unit sought, in the context of the applicant's allegations. If the Board were to hold those allegations as well founded, would it alter the existing unit in the direction requested?

It is not necessary to hear evidence in order to dispose of such a question. In all fairness, we must say that it seems

rather strange that, while the review in 1988 of all the units at CPC required 50 witnesses, called by all the parties, it requires at least nine times more witnesses, barely a year later, to review a single aspect of the question, this time at the request of only one party.

In CFTO-TV Limited (1981), 45 di 306 (CLRB no. 345), the Board explained its usual practice of not holding hearings to dispose of questions regarding the appropriateness of bargaining units (see in particular page 310). This is even more so here, since from 1985 to 1988 the Board spent weeks and weeks on hearings on precisely this subject in the exceptional context of a comprehensive review of the appropriateness for collective bargaining of all the units at CPC.

Furthermore, jurisprudence on the fragmentation of bargaining units is well established: there is a strong presumption against it. Moreover, the Board has always asserted its ultimate discretionary power to determine appropriate bargaining units. As far back as 1976, the Board set out the following rule in Canadian Pacific Limited (1976), 13 di 13; [1976] 1 Can LRBR 361; and 76 CLLC 16,018 (CLRB no. 59):

"Once a union is certified under our system, it becomes the exclusive bargaining agent for all the employees in that unit, members or not, and the employer has the legal obligation to negotiate with it.

As was pointed out in a recent decision rendered by the British Columbia Labour Board:

'... once an appropriate unit has been settled and collective bargaining has begun, a strong presumption exists against changing it. ...'

... Of course, this Board will always take into account the reasons why a specific group of employees is suggesting or proposing a unit of employees as an appropriate one. But the law is clear that Parliament, faced with the fundamental policies it pursues, has delegated to this Board

the duty to analyse the pros and cons of each application and to decide in the final analysis the contents of each bargaining unit."

(pages 26-27; 365; and 491; emphasis added)

(See also Saskatchewan Wheat Pool et al., (1977), 21 di 388; [1977] 1 Can LRBR 510; and 77 CLLC 16,104 (CLRB no. 83).)

After hearing the parties' suggestions, the Board instructed counsel for the applicant to summarize in writing his arguments in favour of fragmentation as well as in favour of the appropriateness for collective bargaining of the unit sought. He was to do so on the basis of the now-particularized allegations of his application, assuming that the Board considered them established. The question is basically quite simple: assuming the facts alleged are well founded, why should the Board split the existing bargaining unit in order to create the one applied for?

Counsel for the other parties were also directed to reply in writing to Mr. Shields' arguments. The Board further indicated that not until an answer were given to the question asked would it decide whether there was any need to hear oral evidence (and, if so, what evidence).

For various reasons, this procedure did not please the parties. Mr. Shields said, somewhat surprisingly, that less than a week was very little time to prepare written submissions. For their part, Messrs. Nadeau and Monette considered the exercise risky since the atmosphere might heat up even more if another interim decision were issued without really settling the matter. We were then reminded that the collective agreements had expired more than a year ago and that CUPW and CPC were at a crucial stage in their contract negotiations.

In spite of the parties' resistance, the Board upheld its direction, considering that if there is one thing a party must be able to do, right from the very introduction of its proceeding, it is to identify the arguments it is relying on. After all, this proceeding dates back to March 1990, and its preparation by LCUC to June 1989. As for the risk incurred, it seemed to us worse to proceed otherwise.

Our analysis of the arguments and documents filed convinced us of the soundness of our ruling. Moreover, having submissions filed in advance enabled all the parties to prepare better than if their arguments had only been known at the time of the hearing. Finally, the fact we held a hearing after presentation of the written submissions also gave all parties an opportunity to supplement their positions orally if they felt they had not had time to express them fully in writing.

In the end, the Board scheduled the oral presentations for July 12 and 13, 1990. In practice, this gave everyone two weeks in which to prepare. Finally, we informed counsel that we were also setting aside July 19 and 20 for them in the event that two days were not enough. As it turned out, no one requested more time and the whole matter was completed on July 13.

III

BACKGROUND

This application can only be understood properly by placing it in its historical and legal context. Up until 1982, since their employer was a government department, CPC employees belonged to the Public Service of Canada. Their

labour relations came under the system applicable to the public service. Therefore, our Board had no jurisdiction over them, just as it has none today over the public service.

At that time, under pressure from the unions and following stormy disputes, the government passed legislation making the Post Office a Crown corporation. One of the many effects of that legislation was to place under our jurisdiction labour relations between Canada Post Corporation and its 26 [sic] bargaining units and 8 bargaining agents at that time. The number of employees represented by these unions varied from as few as 24 for the Economists' Association to 18,000 for the applicant and 20,200 for CUPW.

Under the Code, each bargaining unit requires a collective agreement the negotiation of which may result in a lockout or a strike. Thus, according to the legislation thenceforth applicable to CPC, there were legally as many successive opportunities for disputes as there were units (i.e., 26). In fact, there were groupings; for example, the Public Service Alliance of Canada, whose units have since been subsumed in that of the respondent union, actually negotiated a single agreement for several units. Nevertheless, each of these separate units could engage in separate negotiations, disputes and raids.

Thus it was only a matter of time before the Board was called upon to untangle this skein of too loosely woven labour relations.

The Review of the Bargaining Units

The exercise began in May 1985. It was virtually unprecedented in its complexity, involving nearly 60,000 employees and several phases. The hearings devoted to the comprehensive review of the appropriateness of the various units for collective bargaining (phase I) lasted from May 1985 to December 1987. That phase required 50 hearing days, involved more than 30 witnesses called by the 9 parties and resulted in the Board's examining more than 300 documents, not to mention visits to several postal installations. (See Canada Post Corporation (675), supra.)

That decision goes back to February 10, 1988, a date to remember. In it, the Board noted that letter carriers and postal workers carry out complementary functions. It found nothing in their duties to warrant their being divided for collective bargaining purposes. The decision grouped letter carriers, postal workers and other previously separate groups into an integrated bargaining unit called an "operational" bargaining unit:

"The second bargaining unit shall be an operational bargaining unit consisting of those persons currently represented by LCUC, CUPW, IBEW, and the GL&T groups currently represented by PSAC. It shall include lead hands and first-line supervisors."

(pages 101; and 164)

None of the undersigned was involved in that decision which was part of a saga that has not yet come to an end. The members of the panel that determined the bargaining units at CPC have since left the Board, but are still completing their work under the powers granted to outgoing members by

section 11 of the Code. In their decision, they explained the phases they still had to complete.

One of these phases was the representation vote conducted by the Board in order to give the employees the opportunity to choose their bargaining agent. LCUC and CUPW then faced each other. This highly complex vote, ordered in September 1988, was done by mail until the end of 1988. The Board announced the results on January 17, 1989. It was a very close vote, with a difference of only some 900 votes out of the nearly 40,000 votes cast. It was obvious that the winner, CUPW, was going to have to rebuild unity among its troops.

On January 30, 1989, on the basis of these results, the Board issued a certification order to CUPW; this came into effect two days later, on February 1, 1989. The certificate previously held by the applicant ceased to have effect that same day. Another date to remember.

On January 30, 1989, Vice-Chairman Keller, who signed those orders on behalf of the Board, wrote to the parties as follows:

"This is to confirm the understanding reached by the parties during a meeting on January 27, 1989, whereby the infrastructure dealing with the representation of employees and the organization of the Letter Carriers' Union of Canada, as provided in the LCUC agreement, will remain in place and be honored by the Canada Post Corporation and the Canadian Union of Postal Workers so long as the provisions of the collective agreement between LCUC and CPC remain in effect."

A year had gone by since February 1988, that is, since the decision determining the bargaining units. At the time, Canada Post Corporation (675), supra, was given a rather

mixed reception by the parties, especially by the LCUC executive, which was shocked by it.

Today, CUPW makes much of the public statement released at the time by the president of LCUC, who flatly opposed Canada Post Corporation (675), supra, and took its authors to task (see document 6A dated February 22, 1988). That was his way of criticizing the inclusion of letter carriers and postal workers in the same bargaining unit.

The reaction of the president of LCUC is far from the only one that has enlivened the short history of dealings between CPC and the Board. The proceedings engaged in since 1985 on the issue of the bargaining units have never had the support of all the parties; nor have the decisions of the Board, which is often forced to strike at the very root of interests that each party vigorously defends. It is common knowledge that not only the Letter Carriers but also CPC and the Postal Workers have, individually or jointly, strongly criticized the Board.

Such flareups are not likely to disappear and should not be given any importance. At the end of the day, what is left is the Board's decision and the effect that the Code gives it. There also remains what the parties did in the face of the effect of such a decision. The Code states:

"22.(1) Subject to this Part, every order or decision of the Board is final and shall not be questioned or reviewed in any court, except in accordance with paragraph 28(1)(a) of the Federal Court Act."

Regardless of what each may have said or thought about it at the time, for reasons of their own, none of the parties to Canada Post Corporation (675), supra, attacked the

decision in the Federal Court or requested that it be reviewed under section 18 of the Code (reproduced above on page 2). In short, all the parties accepted, even if only grudgingly, the decision regarding the determination of the bargaining units. Two years later, when concluding his oral arguments before us, Mr. Shields, in substance, made the following admission on behalf of his client, LCUC:

"The applicant does not dispute the conclusions of the first panel as regards the description of the operations."

CPC and CUPW have never stopped contending that the Corporation's activities have not changed since Canada Post Corporation (675), supra. In short, the parties appear today to be in agreement on the work itself, if not on the way to characterize it. We will return to this point later on.

The Aftermath of the Vote

On January 30, 1989, as soon of the results of the vote were known, a certification order was issued along with a letter from Vice-Chairman Keller (page 13 of these reasons). The very next day, the president of LCUC wrote as follows to his business agents:

"To the Attention of All Business Agents:

Dear Brothers:

For your information, I have enclosed copies of letters from the Canada Labour Relations Board and CUPW which outline the agreement that the Collective Agreement and the infrastructure of the L.C.U.C. in terms of representation of the employees will be honoured by the Corporation and the Canadian Union of Postal Workers for as long as the LCUC/CPC Collective Agreement is in place.

The CUPW letter means that the same Union/Management and Health and Safety Committees and other union representation active in the current locals will continue under the jurisdiction of the Canadian Union of Postal

Workers. In addition, all LCUC national and divisional representatives are authorized, under CUPW jurisdiction, to act as CUPW representatives until further notice.

The Canadian Union of Postal Workers has refused to recognize the locals in communities where CUPW does not now have locals but has agreed that more locals are needed because of the increased membership. CUPW confirmed that a review will be conducted to establish more locals but that the forced amalgamation would proceed without delay.

As requested, all LCUC officers will continue to represent the LCUC members under the CUPW certificate until it can take over the duties of representation without jeopardizing the membership. Like some of the other LCUC officers, I do not wish to become a CUPW officer but I will continue to represent the members, as requested, until CUPW can assume the responsibility so that our members are not harmed in the transfer of jurisdiction.

After February 1, 1989, the membership should be encouraged to sign CUPW cards and attend and actively participate at meetings so that we can change the policies we disagree with. Through attendance and participation, we should make sure that we elect the most capable officers to represent us and ensure that we receive equal representation on the committees and at convention. The members must be involved so that they can make CUPW the type of union they want.

The LCUC is proceeding with the pre-negotiation seminars so that it can compile the demands and take them to the CUPW conferences where we will have to convince the representatives of the need for the demands and of our determination to achieve them.

The LCUC is also proceeding with the Bull Session which may be converted to a special convention. If not, a special convention will be called so that the members can properly determine the fate of the LCUC as an organization, the membership, the officers, and the assets. Once a decision has been made regarding the special convention and the date, the National Executive will notify the locals.

The present LCUC membership, including all officers and stewards, will remain members in good standing even though they sign CUPW cards and continue to work with the new bargaining agent after February 1, 1989. Everyone is urged to maintain their pride and loyalty for the LCUC and what it has accomplished as a bargaining agent. This same pride and loyalty should be displayed at CUPW meetings in our efforts to make CUPW the type of democratic union we want.

I sincerely hope that our members will be able to carry on with the tradition of democracy under the new structure. However, if we are unable to change the Union to one we can be proud of, we

will simply wait for an open period and an opportunity to change the bargaining agent.

In closing, I would like to take this opportunity to say thank you to the members for the honour of being the President of the LCUC, a position I will retain until the members choose the fate of the organization at the special convention. Until then, I ask that the members follow the directions given by the National Executive as always.

Yours fraternally,

(signed)

*Robert McGarry,
National President"*

(emphasis added)

In fact, the special convention mentioned by the president was held four months later, in June. Since the defeat of LCUC in the representation vote, its principal officers had remained in office.

It seems established that LCUC, once deprived of its certification, left a fund valued at some \$12 million. (These facts are reported in a judgment handed down by the Supreme Court of Ontario in Guy Rameau v. Letter Carriers' Union of Canada and William Findlay et al., no. 4470, April 20, 1990, and also in the text of the resolutions produced before us.)

Even before the special convention held in June 1989, the president of LCUC deemed it expedient to suggest that an application be made for a review of the bargaining unit "based on the representation of our member rights by CUPW since February 1989 ..." (letter from Mr. McGarry dated June 6, 1989, quoted in Guy Rameau, supra).

His suggestion was eventually endorsed and took the form of this application for review and certification filed on March 1, 1990, some 8 months after the special convention

and 13 months after certification. Earlier, in November 1989, LCUC had also applied for a reconsideration of the vote held by the Board a year earlier. This proceeding (530-1783) is still pending.

IV

THE PARTIES' SUBMISSIONS

The Applicant

In essence, the applicant's argument is that the unit found appropriate for collective bargaining in 1988 has proved not viable in practice, and hence inappropriate. Counsel for the applicant presented five arguments to illustrate the inappropriateness of the existing bargaining unit.

The first argument is based on the inherent differences between the job functions of postal workers, on the one hand, and those of letter carriers and mail service couriers, on the other hand. Counsel cited differences in working hours, duties, locations and supervision at work. He contended that the first group, postal workers, are employed mostly in postal plants, while the second group, outside workers, have a different relationship with the employer and with the public. He pointed out that these two groups have always bargained separately, except for a few years, and that they should each have their own bargaining agent.

The second argument relates to the traditional union structures of LCUC. According to this argument, the structure put in place by CUPW is ineffective and displays its lack of sensitivity to the concerns of letter carriers.

The structure of the new bargaining agent is alleged to be too centralized and ineffective. The applicant referred to a host of complaints filed with the Board by letter carriers under section 37 of the Code (page 33 of these reasons) alleging that CUPW had failed to provide them with basic union representation comparable with what LCUC offers.

Furthermore, this lack of local representatives would render inoperative several consultation mechanisms provided for in the collective agreement. Finally, LCUC objects to the fact that the constitution and by-laws of CUPW rule out consultation with the employer as a means of resolving workers' problems.

The third argument pertains to the route measurement system. LCUC claims that this condition of work is unique to letter carriers, and describes it in detail to illustrate its importance in determining the workload of letter carriers. This argument parallels the first, which dealt with the duties of letter carriers. The applicant pointed out that this mechanism can result in a re-evaluation of duties (hence its importance).

LCUC finds CUPW's performance in this regard deplorable and points to CUPW's constitution and by-laws as proof of its ignorance "[of] the very essence of letter carrier and mail service courier functions" (Mr. Shields's submission).

The fourth argument relates to what the applicant calls "purgings" carried out within CUPW. It cites the random expulsion or suspension of nearly a thousand members. It criticizes in particular the chauvinism of the Toronto/Scarborough area, where hundreds of individuals were

allegedly penalized by CUPW because they had maintained their LCUC membership.

The fifth and last argument has to do with what the applicant sees as CUPW's laughable efforts to operate the bargaining unit. LCUC mentions a pact signed in January 1988 between it and CUPW, which the latter allegedly failed to observe. LCUC refers to the letter from Vice-Chairman Keller dated January 30, 1989 (page 13 of these reasons).

Counsel for the applicant cites in support of LCUC's good faith the circular from its president dated January 31, 1989 (pages 15-17 of these reasons). He contrasts it with the lack of fair play on the part of CUPW which, as early as February 13, 1989, stripped LCUC's officers of the right to act on its behalf in dealings with the employer. Counsel mentions that some officers in the certified union were probably afraid of losing their positions in the elections. He claims that this made them paranoid about LCUC officers.

Further on, LCUC argues that the sheer number of alleged violations by CUPW of its duty of fair representation and the growing discontent among employees change the issue of the bargaining agent into one of appropriateness of the bargaining unit.

Mr. Shields appended to his submission a new copy of the particulars ordered in May. He presents them as a partial illustration of CUPW's countless failures in its duty of fair representation. He lists dozens of alleged cases of untimely grievances filed by CUPW.

Here again, Mr. Shields claims that he was not given reasonable time to prepare his submissions. This, he says,

prevented him from completing a list of all of CUPW's shortcomings. The particulars provided already fill 56 pages.

Finally, the applicant indicated that 16,000 employees had joined its ranks in order to have the Board examine the adverse effects of its earlier decision. (This issue was dealt with in part in Canada Post Corporation (798), supra, on the question of the conditional payment of the initiation fee.)

Counsel for LCUC concluded his oral submissions by urging the Board to hear the evidence that he offers to support his allegations. Finally, he asked the Board to use as the decisive factor in reaching its decision the alleged failure of the present bargaining agent to represent the real interests of the letter carriers and mail service couriers.

The Employer

CPC replied that the applicant has failed to present any valid argument that would warrant a fragmentation of the bargaining unit. Dealing with each of LCUC's five arguments in turn, the employer insisted that its operations have not changed since Canada Post Corporation (675), supra.

Mr. Monette underscored the main facts cited by LCUC (job descriptions, road measurement system, etc.). He illustrated why he considered these facts neither new nor the result of Canada Post Corporation (675), supra, comparing LCUC's allegations with what the Board had said about them previously in the decision in question. He concluded as follows:

"Not only is there absence of fresh relevant facts in support of the application, there are no allegations of fresh facts against the other compelling reasons that brought this unit into existence.

Applicant is attempting to resurrect artificial boundaries and to handicap the provision of a critical public service by fostering competition between union institutions.

We respectfully invite the Board to immediately dismiss the applications."

The Canadian Union of Postal Workers

Counsel for CUPW opened his remarks by stating that no significant changes had occurred in the operation of CPC since 1988.

With regard to the dozens of allegations of failures in its duty of fair representation, CUPW alleged LCUC's general bad faith. He stated that the leaders of the Letter Carriers who had remained in office after the cancellation of their certification had from the start done everything possible to undermine the action of the Postal Workers in representing the bargaining unit.

With regard to CUPW's alleged mishandling of grievances, counsel produced forms referring more than 10,000 grievances to arbitration for the mail service courier and letter carrier group alone.

With regard to the complaints filed with the Board, CUPW counsel argued that nothing should be taken for granted. He referred to two recent decisions by the Board that are far from blaming CUPW for the way it has acted on behalf of letter carriers (Don Greenwood et al. (1990), as yet unreported CLRB no. 795; and Medhat Shehata (1990), as yet unreported CLRB decision no. 807). (In this regard,

Mr. Shields later responded that the complaints in question were not mentioned in his particulars.)

Mr. Nadeau qualified this series of allegations regarding representation as irrelevant, and argued that if there had been failures, they did not demonstrate any inequitable treatment of old and new members of the bargaining unit.

Counsel for CUPW also stressed the structural changes made by his client to give the letter carriers good representation: new officer positions at the national level, creation of locals, enlargement of the bargaining committee, and so on.

Counsel noted in particular that LCUC had provided no details to support its vague allegation of poor representation in the area of collective bargaining. (See LCUC application, paragraph 10.(viii), at page 4 of these reasons.) Emphasizing the centrality of this issue, Mr. Nadeau said that as early as May 22, 1990, CUPW filed with the Board its set of demands for the current round of bargaining; it contained 165 demands. According to counsel, 120 demands applied to all employees, including letter carriers, while 30 related specifically to letter carriers and mail service couriers. He stated that LCUC had had ample opportunity to rebut this assertion, but had not done so.

With regard to the applicant's allegation of "purges," counsel for CUPW spoke of the lack of loyalty of some 600 (not 1,000) hard-core opponents who had freely chosen to continue to belong to LCUC and militate against CUPW, which had tried to welcome them into its ranks. He referred in particular to LCUC's special convention in June 1989, at

which it was decided to establish a "power base" to dislodge CUPW and, according to him, to block the implementation of Canada Post Corporation (675), supra.

V

THE LAW

The Procedure Followed

First of all, a few words about our decision to proceed as we did - that is, by asking the parties to present arguments on the question of the unit's appropriateness for collective bargaining, without committing ourselves to hearing any evidence in support of their arguments.

LCUC cited hundreds of infringements of the Code by CUPW, as evidenced by, among other things, complaints filed with the Board. CUPW countered with the fact that more than 10,000 grievances had been referred to arbitration, as shown by the submission of thousands of forms.

First of all, whether or not these complaints or grievances are well founded is not relevant in this case; what may be relevant is the mere fact that they exist. CUPW does not dispute the existence of these complaints, but rather their validity, while LCUC has not denied the referral of grievances to arbitration. In short, we do not consider the merit of these questions to be relevant; besides, we have not been called upon to deal with their merit. We can therefore take them as established and see how they affect the appropriateness of the bargaining unit (see Saskatchewan Wheat Pool, supra, pages 397; 517; and 622). The same can

be said of the allegations regarding the union's structures, internal management, and so on.

Section 28 of the Code confers on the Board the discretion, indeed the responsibility, to "determine" the unit that is appropriate for collective bargaining. In so doing, the Board does not necessarily decide from among the suggestions made, and it is not bound by the unit proposed in the application. It must first determine, using its own criteria, the unit that it considers appropriate (see the precedents cited in Canada Post Corporation (675), supra).

In the case before us, LCUC's suggestion that it would call 465 witnesses illustrates at least its desire to communicate to us the dissatisfaction of certain employees that it represents. So be it! But the Board must also take into account the undisputed fact that more than 40,000 postal workers and their employer have been without an agreement for a year.

In matters of certification, the long-standing policy has been not to hold public hearings. In the final analysis, in matters of certification, it is the sum of the written submissions that must serve as the basis for the Board's decision. To proceed otherwise would mean that certification might take months and months, and rid the right to bargain collectively of any practical meaning.

Finally, the submissions and documents presented by all the parties have enabled us to clearly delineate the issues without the need for a lengthy hearing.

The Concept of Viability

The unit the applicant describes as appropriate for collective bargaining was judged inappropriate in Canada Post Corporation (675), supra, just two years before the current application and following an unusually extensive hearing. At the time, although dissatisfied, the applicant did not seek to have the decision reviewed; this inaction accordingly assumes a certain importance. For in the case of both the parties and the Board itself, as you make your bed, so you must lie on it.

Moreover, LCUC must bear the heavy burden inherent in any application to fragment a certified unit. LCUC itself recognized this by invoking Saskatchewan Wheat Pool, supra. That having been said, it claims that the facts alleged would justify such a decision on our part.

LCUC claims that it is mainly because of the fact that it is not viable that the operational bargaining unit has proved itself inappropriate for collective bargaining.

The term "viability" is found in a number of decisions cited by LCUC and CUPW, which refer essentially to the same authorities.

Thus it is found in Canadian Pacific Limited, supra. In that case, a certified union for locomotive engineers sought to divide along geographic lines the unit it was certified to represent. The Board dismissed the application. After reiterating the principle that a unit consisting of all employees was the rule, the Board looked at factors that might nevertheless cause it to judge a particular group as

an appropriate bargaining unit. One of the factors identified was the "viability of the bargaining units":

"A combination of various factors, some already mentioned and others, may deter the Board, because of its experience in the matter, from establishing a large single unit when these factors indicate that the chances of survival of such a unit are not good and that its creation will inevitably lead to unsteady labour relations. Then the Board will alternatively accept smaller and separate bargaining units."

(pages 31; 368; and 493; emphasis added)

Further on in this decision, the Board asserted that evidence of inequalities in the representation afforded members of the unit could be taken into account. In LCUC's view, the "purges" of its supporters show such a lack of representation and augur an inevitable instability.

Later, in Saskatchewan Wheat Pool, supra, the Board elaborated on the weight to be given in matters of certification to allegations of deficiencies in representation. It specified that the quality of representation was assessed with regard to one's obligations as a bargaining agent. The Board was careful to note in passing that the internal affairs of unions did not carry any weight. The Board said:

"The duty we are discussing is one of fair representation by the bargaining agent vis-à-vis its obligations as a bargaining agent. It is not the question of participation by union members in the internal affairs of their union. The fair representation referred to in Canadian Pacific Limited is the duty of fair representation discussed in Entreprises Télé-Capitale Ltée in which the Board said:

...

If a bargaining agent cedes bargaining rights for a dissident faction within the unit, the Board may find that those employees can effectively exercise their rights under the Code only through separate representation.

The evidence sought to be adduced by Local 1 was not directed to the duty of fair representation

of them. There were no allegations that their members were not represented vis-à-vis their employers. For this reason, the Board ruled that the proposed evidence was not relevant to the question of appropriateness of bargaining units raised in these applications."

(pages 396-397; 516-517; and 622)

In the case referred to, Entreprises Télé-Capitale Ltée, Division CFCM-TV et CKMI-TV (1976), 16 di 230; and 77 CLLC 16,065 (CLRB no. 71), the idea of a separate unit for journalists was rejected because the Board considered that such a unit would not be "viable." This was an application to divide a unit by splitting off the journalists who said they were dissatisfied with the way their union at the time was representing them.

After determining that the unit sought was inappropriate, the Board expanded on its concerns with regard to a union's duty of fair representation. It implied that, if a union provided poor representation, the Board might judge its bargaining unit not viable.

Thus LCUC is asking us to apply those suggestions to this case. With all due respect, we can only rely on these precedents with a great deal of caution. Our reservation is based on the following reason taken from the last decision cited:

"The situation at Télé-Capitale, unearthed during the course of the hearing, raises serious questions about the duties and responsibilities of the bargaining agent certified under the Canada Labour Code. While the Code has no express provision imposing a duty of fair representation upon certified bargaining agents, as do some provincial labour codes, such duty can be inferred from a reading of Sections 110, 126(c) and 136(1)(a) of the Code, which read as follows:

'110.(1) Every employee is free to join the trade union of his choice and to participate in its lawful activities.

(2) Every employer is free to join the employers' organization of his choice and to participate in its lawful activities.'

'126. Where the Board

(c) is satisfied that a majority of employees in the unit wish to have the trade union represent them as their bargaining agent, the Board shall, subject to this Part, certify the trade union making the application as the bargaining agent for the bargaining unit.'

'136(1) Where a trade union is certified as the bargaining agent for a bargaining unit,

(a) the trade union so certified has exclusive authority to bargain collectively on behalf of the employees in the bargaining unit;'

All the employees in a bargaining unit, in exercising their collective rights in choosing a bargaining agent, have a right to expect their interest to be equitably protected by that agent.

The granting of exclusive bargaining rights imposes a duty upon a union to represent equitably all the employees within the bargaining unit. This obligation cannot be readily shirked, as seems the case in the instant application whereby NABET is prepared to cede bargaining rights for a group of employees for no apparent reason other than that they represent a dissident faction within an appropriate bargaining unit.

The appropriate bargaining unit, represented by NABET, continues to encompass the journalists. It is therefore incumbent upon both to make the necessary efforts to solve their differences.

This Board does not countenance lightly the 'sloughing off' of responsibilities imposed by the Code. When made aware of such failures, the Board will take whatever appropriate remedial action is within its powers."

(pages 233-234; and 341)

That decision which dates back to 1976 illustrates mainly the Board's concern with finding a way to sanction the unions' duty of fair representation, at a time when the Code did not explicitly sanction that duty. This concern also appears in the remarks in Saskatchewan Wheat Pool, supra.

The first explicit sanction of the duty of fair representation only came about in 1978 in the form of a prohibited unfair labour practice.

Let us return to before 1978. In Canadian Broadcasting Corporation (1977), 19 di 166; [1977] 2 Can LRBR 481; and 77 CLLC 16,102 (CLRB no. 94), the Board still referred to the quality of representation. It said:

"If all of these allegations [concerning unfair representation] had any substance in fact, this Board, as it has already pointed out in other cases, would take a serious look at that situation."

(pages 187; 495; and 600; emphasis added)

Our examination of the Board's case law indicates that the "other cases" referred to then were probably those already mentioned, except maybe Soo-Security Motorways Ltd. (1974), 4 di 51; and 74 CLLC 16,109 (CLRB no. 14), where the Board said simply that "viability" would from now on be part of the criteria used to determine the appropriateness of bargaining units.

Upon consideration, it appears that only two decisions issued following the coming into effect of section 37 spoke of viability to any degree: Pacific Western Airlines Ltd. (1983), 52 di 56 (CLBR no. 416), and National Bank of Canada (1985), 58 di 94; 11 CLRBR (NS) 257; and 86 CLLC 16,032 (partial report) (CLRB no. 542).

In the first of these decisions, the Board said:

"Consideration of a separate bargaining unit of Line Supervisors was addressed by the union in argument. It said that such a unit would not be 'viable'. Up to now at least, the viability of a bargaining unit has not been determinative factor in this Board's consideration of appropriateness. It is, though, a phrase that has been gradually appearing in the vocabulary of labour relations practitioners and it causes us some concern. Granted, the strength or weaknesses of bargaining units may be taken into account at times, for example, in matters concerning bargaining in bad faith, but, if they are to become a measure of appropriateness, the role of the Board could take on some new dimensions and perhaps the image of the 'defender of public

order' is not that far off. We shall leave that question for another day."

(pages 67-68; emphasis added)

At the time, the Board did not discuss concepts or case law. It would appear that viability was perceived as the "strength or weakness" of a unit, i.e. its relative ability to make an employer yield, while past decisions focussed on a bargaining agent's ability to discharge its duty of representation with respect to all its members, without discrimination.

In National Bank of Canada, supra, the Board dismissed Pacific Western Airlines Ltd., supra, and reaffirmed essentially that viability constitutes a criterion used amongst others in certification matters. It explained:

"The viability criterion has gradually come to be included in the list of criteria to be considered, because the constant tendency of Parliament to impose additional obligations on bargaining agents has forced us to pay closer attention to whether a newly created bargaining agent will have the necessary ability, with the bargaining unit that it proposes as appropriate, to engage in productive collective bargaining and defend adequately the rights of the members of the unit to be created with the endorsement of the Board.

The author of 'Union Organization of Canadian Chartered Banks: An Update', supra, made the following comment on the question of viability:

'... [A]ll of the criteria by which appropriateness is determined are really attempts to define what, from past experience, have proved to be the characteristics of units, which are viable in that they are capable of arriving at a collective agreement with the employer. When all is said and done the acid test is surely a practical one, in that a unit which meets all the critical requirements is really only appropriate if it actually works. It is difficult to say as yet that the single branch unit has really met this test.'

(page 56; emphasis added)

Without entirely endorsing this comment, the Board does agree that viability should be included with the criteria already used by the Board. A proposed bargaining unit must be intrinsically viable, but it may be extrinsically non-viable,

if the Board finds, when it examines whether the bargaining agent proposing the unit is an association within the meaning of the Code, that there are real reasons why this agent is not capable of signing a contract with the employer. In some cases, the Board has no choice: the Code dictates its decision. It is uncommon for mandatory provisions to appear in the Code, and yet paragraphs 134(1)(a) and (b) require that even if a bargaining agent fulfils all the requirements of the Code for certification, the Board shall not certify it, and if it has done so, any collective agreement signed by such a bargaining agent is deemed not to be a collective agreement. The collective agreement has no legal status ab initio, because the bargaining agent is not viable in law.

Between this statutory extreme and more ordinary cases, there is a broad area that the Board has had to consider, believing that it has a duty to determine whether a bargaining unit is intrinsically and extrinsically viable."

(pages 196-197; and 357-358)

Consequently, the viability criterion is now more closely linked with the ability to enter into a collective agreement. There is no more mention of the duty of representation as was the case in the pre-1978 decisions. Furthermore, the criterion appears restricted to "newly created" bargaining agents. That is certainly not the case here.

The Board has, over the years, made a list of the criteria to determine appropriate bargaining units. Viability, we believe, has obviously had more weight in our case law prior to than after 1978, inasmuch as it related to the duty of representation within the meaning of the current section 37 of the Code.

The official sanction of the duty of representation was incorporated in the Code in 1978 with the adoption of section 136.1 (Part V - Industrial Relations):

"136.1 Where a trade union is the bargaining agent for a bargaining unit, the trade union and every representative of the trade union shall

represent, fairly and without discrimination, all employees in the bargaining unit."

That text was amended in 1984 because some considered that the Board had interfered in the way unions bargained as opposed to the way they applied collective agreements. (On this subject, see Peter G. Reynolds et al. (1987), 68 di 116; and 87 CLLC 16,011 (CLRB no. 607).) Therefore, Parliament amended the above-mentioned section to diminish its scope by giving it its present form. However, its sanction, section 99, remained the same. These provisions now read as follows:

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

"99.(1) Where, under section 98, the Board determines that a party to a complaint has contravened or failed to comply with ... section 37,... the Board may, by order, require the party to comply with or cease contravening that ... section and may

...

(b) in respect of a contravention of section 37, require a trade union to take and carry on on behalf of any employee affected by the contravention or to assist any such employee to take and carry on such action or proceeding as the Board considers that the union ought to have taken and carried on on the employee's behalf or ought to have assisted the employee to take and carry on;

...

(2) For the purpose of ensuring the fulfilment of the objectives of this Part, the Board may, in respect of any contravention of or failure to comply with any provision to which subsection (1) applies and in addition to or in lieu of any other order that the Board is authorized to make under that subsection, by order, require an employer or a trade union to do or refrain from doing any thing that it is equitable to require the employer or trade union to do or refrain from doing in order to remedy or counteract any consequence of the contravention or failure to comply that is adverse to the fulfilment of those objectives."

The scope of these provisions is far-reaching, not to mention the basic right of dissatisfied employees to ask that a certification be revoked.

Although the parties did not argue these points, we find it is reasonable to say, without having to decide the issue, that at least since 1978 the only means for the Board to sanction breaches of section 37 is found at section 99 of the Code.

The last decision that explains this viability issue, i.e. National Bank of Canada, supra, moves away from the question of the duty of representation to come back to the ability to bargain, i.e. the ability to enter into a collective agreement. This does not mean that we could not take account of breaches over a number of years to establish a systematic weakness with respect to a group in particular. This being said, it is likely that such a chronic weakness would also qualify as a lack of common interest between various groups.

All in all, the concept of viability is far from being a panacea and even less a way to control the quality of representation. A unit is not viable when it is not appropriate for collective bargaining and vice versa. This brings us back to the fact that we cannot assess a bargaining unit's appropriateness on the basis of one single criterion; we can best evaluate appropriateness from a wide range of criteria.

The Parameters of Appropriateness

A good summary of the criteria that play a role in determining a unit's appropriateness follows:

"... Starting from the point of view of respect for the existing bargaining unit, the Board will consider in such applications the usual factors it considers in any appropriate bargaining unit determination: administrative efficiency and convenience in bargaining, industrial stability, lateral mobility of employees, common framework of employment conditions, community of interest amongst employees, geography, bargaining history, the structure of bargaining units generally in the particular industry, employee wishes, and so forth: see, in particular, Insurance Corp. of British Columbia, [1974] 1 Can LRBR 403, BCLRB No. 63/74."

(Westar Timber et al. (1987), 14 CLRBR (NS) 360 (B.C.), page 372)

CPC is a Crown corporation that provides an essential service. The Board has already dealt with the characteristics of Crown corporations that are responsible for essential services and with the relevant policy on the determination of bargaining units.

"... a common policy ... the need to guard against fragmentation of the employees among more than one bargaining unit, with the latent potential which that would have for competitive bargaining and sequential shutdown of the essential service. We simply are not prepared to dilute that policy by allowing exceptions in any but the most compelling of cases. Our extended review of the situation of the licensed officers on the ferries satisfies us that no such unambiguous case can be made for the separate bargaining unit proposed for them."

(British Columbia Ferry Corporation, [1977] 1 Can LRBR 526 (B.C.), page 543; emphasis added)

The applicant has not asked us to depart from these guidelines, and there is no reason why we should.

VI

DECISION

CPC's Operations

All parties recognized that the description of CPC's operations set out in Canada Post Corporation (675), supra, was accurate. It is appropriate to refer to that description.

"In general terms, the organization of the Corporation can be divided between those employees performing operational work, ... white-collar employees who are involved in the support of the ... principal operations. ...

Those employees ... involved in the current operational units of Canada Post are integral cogs in a network, the object of which is to deliver messages (the mail)... from a sender to a receiver. ... the Corporation has established a network operational plan... An upset in any part of the network impacts and impinges on all the others.

...

... the network and each person involved in that network are functionally and integrally related one to the other, that the network can truly be described in terms of the whole as the sum of its parts with no natural boundaries between the work performed by employees in the different operational units. Other bargaining agents, LCUC for example, ... proposed that whereas there is an integrated network, there are natural boundary lines delineating the job functions and job interests between the various groups in that network. ...

...

Much time was spent, a large number of documents were filed, and many witnesses were heard to describe the operational aspects of the Corporation's function. This whole aspect is much less complex than appears on the surface. The entire operational work of the Corporation can be described as the receipt, preparation, processing, consolidation and dispatch of mail. This work involves employees represented by CPAA, CUPW, LCUC, IBEW, PSAC and APOC. ...

Prior to analyzing in greater detail each of the main elements involved in the movement of mail from reception to dispatch, we believe it is fair to say that those main elements remain constant

regardless of the size and location of the office. ... It is important to remember that the movement of mail is at all times a continuum, a conveyor belt on an assembly line,...

The first element in the movement of mail is the collection of it. That can be done in virtually any postal facility, staffed by members of CPAA or CUPW, or in sub-post offices. Additionally, members of LCUC are involved in the collection of mail in that the mail service couriers are responsible for clearing street mail boxes... Thus, each of the three major groups involved in mail handling, CPAA, CUPW, and LCUC, are involved in the first element, the collection of the mail.

Once the mail is brought to a postal facility, the unloading is done by either a member of LCUC or CUPW, depending on the method of manipulation used. The mail is then processed. ... The actual processing of the mail is, in general terms, handled by members of the CUPW bargaining unit, although there can be involvement by members of the LCUC bargaining unit in certain aspects of it. This can also involve the relabelling of sortation boxes...

...

In addition to the involvement of the letter carriers in the relabelling of cases, there are also situations where members of the LCUC bargaining unit are involved in the sortation process. This is done by night routers and night sorters, also known as bag men, who are involved in larger volume offices where the sortation cannot be performed by the letter carriers at the beginning of their walk. The nature of the sortation handled by the night routers, night sorters and postal clerks is essentially the same.

...

Once the processing of mail has been completed, it is dispatched by members of the LCUC bargaining unit (mail service couriers)... to offices from which final delivery ... is effected. The final delivery is done through lock-boxes, general delivery service, group mail boxes, or by door-to-door delivery, ... Prior to effecting the actual delivery ... a final sort is required. The final sortation is done by members of LCUC ... or the members of CPAA or CUPW, ...

In addition to LCUC members being involved in the actual delivery of mail to customers, that work is also performed by members of the CUPW ... carrying out their counter duties in postal facilities where individuals come to pick up mail, registered letters, parcels, etc.

... the functions involved in the movement of mail are totally interdependent; ... non-performance of any of the functions by any of the persons involved in the operational area will either delay or ensure the non-movement of mail. This is the case whether it is a member of the CPAA bargaining unit, the LCUC bargaining unit (mail service

courier or letter carrier), the CUPW bargaining unit (mail handling or customer service)...

... There is considerable contact between the members of CUPW, LCUC and PSAC and IBEW in the operational unit. In many locations they share facilities and work side by side. ..."

(pages 79-86; and 142-149; emphasis added)

This in part is, in their own words, how our colleagues summarized the main elements of the work performed by letter carriers, couriers and postal workers. According to the three counsel, those facts are constant.

Analysis of LCUC's Arguments

Of the five arguments submitted by the applicant in support of its application, two clearly deal with the employees' job functions and with CPC's operation: first, the differences with respect to tasks, work places and supervision; second, the route measurement system.

The Board thoroughly analyzed those issues in Canada Post Corporation (675), supra, and we can only refer the parties to what it said at the time. Nothing in LCUC's arguments today allows us to say that the letter carriers' work-related characteristics warrant a separate unit. Obviously they perform special tasks. However, nothing tells us that sounder labour relations could be achieved in another bargaining format.

Work-related differences do not justify the findings sought by LCUC. We cannot deny that each group, i.e. letter carriers and the other operational employees, has distinctive characteristics, but work-related elements hint above all at a deep-rooted community of interest if only one were to cease stressing the differences.

A unit is determined on the basis of its ability to bargain collectively. The problems mentioned by the applicant focus on a completely different issue. In its arguments, the applicant lists its concerns, but does not say how the unit's present format does not allow the parties to enter into a collective agreement.

Much was made of the history of bargaining. In fact, in the eyes of a board such as ours, the history of bargaining at CPC is terribly disappointing. We have ceased counting the disputes that occurred in the last 15 years, including two disputes requiring the convening of Parliament and the adoption of special acts (Postal Services Continuation Act, S.C. 1978-79, c. 1 (adopted on October 17, 1978), and Postal Services Continuation Act, 1987, S.C. 1987, c. 40 (adopted on October 15, 1987)).

One could always argue that the above-mentioned acts affected CUPW and not LCUC. That means forgetting that they also affected CPC. Those acts attest to the fact that a non-viable labour relations framework existed, i.e. a framework in which the parties could not freely enter into collective agreements. It is not important to know if the groups that were not directly affected benefitted or suffered from these special laws. Overall, one thing is sure, free collective bargaining did not benefit from them.

Neither the number nor the multiplicity of these units have established that they were better equipped to bargain collectively. On the contrary, they have repeatedly disrupted an essential service, with no apparent benefit to anyone.

The model appropriate bargaining unit consists of a group of employees that manages to bargain effectively with the employer and vice versa.

History has taught us that repeated labour disputes do not necessarily constitute an expression of irrational stubbornness on the part of an employer or of a union. Just consider the situation in the St. Lawrence ports before the adoption of section 35 of the Code. What that provision did was to extend the existing bargaining units in such a way as to allow effective negotiations, if only the parties so wished.

Every dispute at CPC affects, directly or indirectly, all employees. Without exception, all these disputes referred to earlier, including the most recent one, occurred within the former bargaining structure to which the applicant is asking to return.

Of course, bargaining structures are no substitute for maturity of parties. However, some structures have attested to their inadequacies. That is the case of the pre-1988 structures.

All other LCUC arguments more or less turn around allegations of breaches by CUPW of its duty of fair representation: the union structures are different; local consultation is dismissed under CUPW's constitution and by-laws, etc.; finally, hundreds of breaches have to do with the referral of grievances to arbitration.

As we saw earlier, the merits of these allegations is not relevant. Only their existence is relevant. Even in

assuming that these allegations that lead to section 37 complaints were founded, section 99 of the Code would still be the proper sanction.

Such breaches are likely and even foreseeable in a group of this size. However, nothing in LCUC's allegations suggests that CUPW, as bargaining agent, deliberately attempted not to represent fairly all members of the bargaining unit. On the contrary, all indicates that CUPW attempted, in very difficult circumstances, to bargain collectively for all employees belonging to the present bargaining unit, including the letter carriers.

"The Board is primarily concerned not with the quality of representation - judged against external comparisons with other bargaining relationships - but, rather, with the equality of representation as between groups within the particular bargaining unit."

(University of Guelph, [1975] 2 Can LRBR 359 (Ont.), page 365)

Finally, let us deal with the issue of the employees' wishes, a sensitive issue. Obviously, 16,000 employees believed in this application. Given they joined the applicant, there must be a certain amount of dissatisfaction somewhere. The problem is that not only would some letter carriers be disappointed in their new bargaining agent, but, as is suggested, they would also want to change their bargaining unit.

In the best interest of all, the Board cannot amend bargaining units without compelling reasons. If it did so, no one would know where to stand with respect to collective bargaining. That is why the Board always needs very convincing arguments before amending a certified unit, moreover a recently certified unit.

Changing bargaining unit is not the same thing as changing bargaining agent. One can change unions to one's liking, but bargaining units are the Board's responsibility. It attempts to define them as best it can so negotiations within the whole of the enterprise can succeed. The Board cannot alter a unit for the simple reason that a portion of the employees is dissatisfied. This is a hard rule, but time has proven it to be the best rule.

We do not doubt the sincerity of the letter carriers and couriers who have supported LCUC in this application. However, our sympathy does not matter much, because we cannot give this fact significant weight in determining a bargaining unit's appropriateness (see Canadian General Electric Company Limited, [1979] 2 Can LRBR 310; Atomic Energy of Canada Ltd. (1977), 25 di 377; [1978] 1 Can LRBR 92; and 78 CLLC 16,128 (CLRb no. 107)). Undoubtedly, things would have been different had the majority supported LCUC; but then the issue of the bargaining agent, and not of the unit, would have been raised. But the majority did not support LCUC.

In view of the above-mentioned criteria, we have no choice but to conclude that LCUC has not raised convincing arguments to justify the fragmentation of the present so-called operational bargaining unit.

VII

CONCLUSION

In all likelihood, it will take a few collective agreements before we can truly appreciate the value of the bargaining

units decided in 1988. If this structure proves to be as unsatisfactory as the preceding one, we will have to look for a different solution, but not before.

In fact, LCUC's main criticisms, if not the only ones, concerning the present unit deal with CUPW's direction and orientation. Reviewing the unit's appropriateness is not the proper channel for this type of concern. If the letter carriers and couriers, after really trying, are truly dissatisfied with their bargaining agent, they can get rid of it the same way others do: via revocation or raiding. In the meantime, the certified union and CPC must be given a chance to make the most of the situation.

LCUC asked us to involve the Board in internal union affairs. We would of course have preferred to avoid it, but we had to. What we saw gave us a general feeling of discomfort.

For example, we do not know what to think of the correspondence cited by LCUC, i.e. Mr. McGarry's letter dated January 31, 1989 (pages 15-17 of these reasons). This letter was sent the day before CUPW was supposed to start representing the letter carriers. The president of LCUC wrote to his supporters that he and fellow officers would continue to represent LCUC members, and that they intended on remaining members in good standing of LCUC while signing CUPW cards. He added that all LCUC members should do the same. He concluded that if they were unable to change CUPW to their liking, they would start a raiding campaign!

That is but one example. We can undoubtedly interpret this letter in various ways, but we have doubts as to its intentions.


The Board has neither the desire nor the mandate to judge the parties' solidarity or leadership, except obliquely, when dealing with unfair labour practices. It does however have the responsibility of ensuring that the periodic scarcity of these qualities does not unduly affect its own operation. For the rest, finding solutions to internal disputes bears on the unionized employees. If they fail to do so, in the short term, their organizations risk losing a large part of their credibility, and for cause.

At present, the Board's files are overflowing with redundant complaints that have obviously been filed at someone's expense. For example, LCUC lists 159 individual complaints filed with the Board, on behalf of employees in Scarborough who allege having been deprived of local union representation, 45 complaints concerning Streetsville, 53 Mississauga, 39 Markham, and all for the same reason. One complaint would have sufficed; the union filed 296!

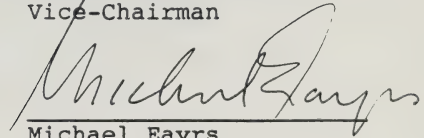
This type of useless and costly repetition illustrates the war of quantities that the union officers appear to be waging. After hundreds of LCUC complaints, CUPW says it referred more than 10 000 grievances to arbitration for the letter carriers alone! In fact, wishing not to be outdone, CUPW attested to its quality via the quantitative method. What is the use of negotiating a better grievance procedure if only to disable it the next day?

With respect, this seems far, very far, from promoting freedom of association.

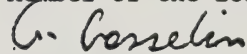
This being said, LCUC's application is dismissed.



Serge Brault
Vice-Chairman



Michael Eayrs
Member of the Board



Ginette Gosselin
Member of the Board

ISSUED at Ottawa, this 7th day of August 1990.

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SUMMARY

ANTONIO ALMEIDA, APPLICANT,
VIA RAIL CANADA INC.,
EMPLOYER, AND TRANSPORT
CANADA, INTERESTED PARTY.

Board File: 950-133

Decision No.: 819

RÉSUMÉ

ANTONIO ALMEIDA, REQUÉRANT,
VIA RAIL CANADA INC.,
EMPLOYEUR, ET TRANSPORTS
CANADA, PARTIE INTÉRESSÉE.

Dossier du Conseil: 950-133

Décision n° 819

This case deals with a referral of a safety officer's decision to the Board pursuant to section 129(5) of the Canada Labour Code (Part II - Occupational Safety and Health).

The applicant, a passenger service attendant, refused work on the grounds that perceived harassment, verbal abuse, discrimination and ostracism directed against him by fellow employees constituted a danger to his mental and physical health. A safety officer, following an investigation into the circumstances of the refusal, concluded that there was no danger within the meaning of the Code.

Having considered all the evidence and submissions before it, the Board was satisfied that there was no danger within the meaning of the Code and confirmed the decision of the safety officer.

Il s'agit d'un renvoi au Conseil d'une décision d'un agent de sécurité, aux termes du paragraphe 129(5) du Code canadien du travail (Partie II - Sécurité et santé au travail).

Le requérant, un commissaire de bord, a refusé de travailler parce que, selon lui, le harcèlement, les injures, la discrimination et l'ostracisme dont il était victime au travail constituaient un danger pour sa santé mentale et physique. À la suite d'une enquête sur les circonstances du refus, l'agent de sécurité a conclu qu'il n'existait aucun danger au sens où l'entend le Code.

Après avoir examiné tous les éléments de preuve et les arguments à sa disposition, le Conseil est convaincu qu'il n'y avait pas de danger au sens où l'entend le Code et a confirmé la décision de l'agent de sécurité.



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Reasons for decision

Antonio Almeida,
applicant,
and
VIA Rail Canada Inc.,
employer,
and
Transport Canada,
interested party.

Board File: 950-133

The Board consisted of Mr. Michael Eayrs, Member, sitting as a single member pursuant to section 156 of the Canada Labour Code (Part II - Occupational Safety and Health).

Appearances:

Mr. Antonio Almeida, accompanied by Ms. Marylin Pitcher, for the applicant;
Mr. Domenic Scalia, accompanied by Mr. Russel Wells, for the employer; and
Mr. W.B. Armstrong, safety officer.

Heard at Toronto, Ontario, May 1, 1990 and May 28, 1990.
(This case was originally scheduled for hearing December 15, 1989, but was postponed due to circumstances beyond the control of the Board.)

I

This is a referral of a safety officer's decision to the Board pursuant to section 129(5) of the Canada Labour Code (Part II - Occupational Safety and Health).

The parties involved in this matter, namely the applicant, the employer and the safety officer, all correctly and within specified time limits followed the procedures required by the Code with respect to the refusal to work, subsequent reporting and investigations and referral of the safety officer's decision to the Board.

In this particular case, the Board has, as part of its proceedings and record, extensive written documentation prepared by and testified to by the applicant and, as a result of subpoena by the applicant, the full narrative report of the safety officer's investigation on which he based the decision issued to the applicant and subsequently referred to the Board.

The applicant, Mr. Antonio Almeida, is employed by VIA Rail Canada Inc. (VIA Rail) as a senior service attendant and has worked in the railway industry for approximately 22 years.

The primary duties of a service attendant consist of serving passengers, providing take-out food service and bar service, making up berths and other related duties.

On the morning of 26 October, 1989, Mr. Almeida, having reported to work, refused the work assigned, namely as a passenger service attendant on the Park Car, train no. 9, scheduled to depart Toronto at 1300 hours that day.

His reasons for refusal were based on his perception of harassment, verbal abuse, discrimination and ostracism directed against him by fellow employees in the workplace.

Had he continued work, Mr. Almeida's tour of duty would have extended from Toronto to Winnipeg and return, and his supervisor during the trip would have been Mr.

E. Deschamps, train service manager.

At a properly constituted meeting with VIA Rail officials and a member of the Safety and Health Committee, Mr. Almeida maintained his refusal to work pursuant to section 128(1)(b) of the Code.

Mr. R. Wells, manager, on-train services for VIA Rail, immediately contacted Transport Canada and Mr. W.B. Armstrong, safety officer no. 2787; a safety officer within the meaning of Part II of the Code, promptly convened and conducted an investigation in accordance with section 129(1) of the Code. Section 129(1) reads as follows:

"129. (1) Where an employee continues to refuse to use or operate a machine or thing or to work in a place pursuant to subsection 128(8), the employer and the employee shall each forthwith notify a safety officer, and the safety officer shall forthwith, on receipt of either notification, investigate or cause another safety officer to investigate the matter in the presence of the employer and the employee or the employee's representative."

The investigation group convened by Mr. Armstrong comprised Mr. Almeida (the employee), Mr. Brian Mattison (Occupational Safety and Health Committee), Mr. R. Wells (VIA Rail), and Mr. Armstrong (safety officer).

Mr. Armstrong's lengthy and meticulous investigation of the matter (which included holding departure of train

no. 9 to interview two key individuals) resulted in a written decision dated November 2, 1989 from which we quote the following pertinent extracts:

"Mr. Alameida stated his Refusal to Work on October 26, 1989, was prompted by the following perceived conditions in the work place generated by his peers and associates:

- Harassment*
- Badgering*
- Discrimination*
- Ostracism*

Mr. Alameida further stated that these perceived conditions caused him such mental and physical aggravation and stress that, in his opinion, they constituted a danger to his Health and Safety in the work place. He therefore invoked his Right to Refuse Dangerous Work under Section 128 (1) (b) of the Canada Labour Code which reads as follows:

128. (1) Subject to this section, where an employee while at work has reasonable cause to believe that:

(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or

(b) a condition exists in any place that constitutes a danger to the employee,

the employee may refuse to use or operate the machine or thing or to work in that place.

Section 122 (1) of the Canada Labour Code defines danger as:

'DANGER - means any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected.'

I have completed my investigation into this Refusal to Work.

On the basis of evidence developed through the investigation, interviews with Mr. Alameida, associated employees and the employer, VIA Rail, it is my conclusion that the conditions inferred to by Mr. Alameida, under Section 128 (1) (b) of the Canada Labour Code, are without foundation and therefore did not constitute a danger to Mr. Alameida on October 26, 1989."

At the hearing, Mr. Almeida testified in support of his position and supplied a written narrative of his version of the events in October 1989 giving rise to his refusal to work. That narrative, dated October 25, 1989, was addressed to Messrs. R. DeWolfe and R. Wells of VIA Rail and was made available during the investigation of his refusal on October 26, 1989.

In further support of his position, Mr. Almeida also supplied, at the hearing, a written narrative of alleged incidents dating back to September 1987; in his view, his personal and work situation started to deteriorate at that time as a result of a number of work-related incidents involving fellow workers and his supervisors.

It should be noted this latter document was admitted on Mr. Almeida's insistence, despite the Board's caveat that it had little or no relevance to the matter at hand and after counsel for VIA Rail withdrew his objection to its admission.

The incidents relevant to Mr. Almeida's refusal to work and the safety officer's subsequent ruling took place during two Toronto-Winnipeg return trips and involved inter action between the applicant and Mr. Jerome Moe (a service attendant) during the trips of October 5 and 16, 1989 and Mr. Edward Deschamps (train service manager) during the trip of October 16, 1989.

Both these individuals were interviewed during the safety officer's investigation of October 26, 1989; both testified at the Board's hearing into this matter and have since retired from service with VIA Rail.

The relevant incidents giving rise to Mr. Almeida's refusal to work may be briefly described as follows:

1. During the October 5th trip, Mr. Moe, in response to two passengers' requests went to the Park Car (to which Mr. Almeida was assigned) to locate the applicant. He found Mr. Almeida in Bedroom "A" of the Park Car and asked him to provide the service requested.
2. During the October 16th trip, Mr. Moe, in response to a passenger's request for a Coke, which he was unable to supply from his stock or from the diner, approached Mr. Almeida twice (alone and then accompanied by Mr. Deschamps). Mr. Almeida, who was completing linen slips when approached, supplied the Coke to Mr. Moe after the second request.
3. During the same trip, on October 18th, Mr. Deschamps, in response to passengers' requests, sought out Mr. Almeida and required him to leave the roomette in which he was located to open the bar in the Park Car.
4. There was also evidence with respect to the October 16th trip about interchanges between Messrs. Deschamps and Almeida concerning Mr. Almeida's attendance at meals and the assignment of certain sleeping quarters to Mr. Almeida.

According to Mr. Almeida, the October incidents constituted deliberate harassment by a fellow employee (Moe) and his supervisor (Deschamps), and the combination of "harassment, badgering, discrimination and ostracism" exercised against him was such that it constituted a

danger to his physical and mental health and thus justified his refusal to work.

In his opinion, these incidents exemplified a continuum of similar events, commencing in 1987, and supported his view that a number of co-workers and supervisors were engaged in some form of conspiracy against him. His written narrative of the events of October 1989 is prefaced: "More of the same, in different ways - continued harassment."

On the other hand, Messrs. Moe and Deschamps both perceived the October events firstly as necessary interaction between co-workers engaged in passenger service and secondly as unusual only in the context of the anticipated or actual negative reaction by Mr. Almeida to any required interaction with his co-workers.

Mr. Deschamps did submit a written report to his supervisor about the incidents of the October 16th trip and Mr. Almeida's attitude.

At the hearing, neither witness displayed any animosity whatsoever toward the applicant.

III

Mr. Almeida claims that as a result of the long history of harassment to which he has been subjected he was fully justified in refusing to work. He feels his health and personal life have been severely and adversely affected. He claims that continued exposure to the conditions of which he complains might cause sufficient stress to bring about a collapse or a stroke. He requests the Board to

find in his favour and award him monetary damages for his losses (unspecified).

VIA Rail notes that this is an unusual case in the context of matters involving a refusal to work over an alleged danger within the meaning of the Code. It urges the Board to consider the question of whether the conditions alleged by the applicant are indeed the type of "danger" contemplated by the Code and further urges the Board to consider the question of "immediacy" in deciding the instant case. With respect to the matter of monetary compensation raised by Mr. Almeida, VIA Rail points to the fact that no disciplinary action is at issue in this case and thus there is no basis for consideration of such compensation.

IV

Danger is defined in the Code as:

" 'danger' means any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected."

(emphasis added)

In situations involving an employee's refusal to work, the Board has consistently confined the definition of danger to circumstances where the alleged danger has been of such an acute or immediate nature that the use of the particular machine, thing or place must cease until the situation is rectified (see David Pratt (1988), 73 di 218; and 1 CLRBR (2d) 310 (CLRBR no. 686).

In the instant case, the applicant perceived a potential danger to his health derived from a series of alleged incidents dating back to 1987. His final decision to

refuse work on October 26, 1989 was based on incidents occurring earlier in that month and was made, presumably, on his assumption that similar incidents would occur on the trip scheduled to depart on that day. Thus, at the time of his refusal, no element of acute or immediate danger existed in his workplace.

Further, absent expert medical evidence, this Board cannot and does not attempt to assess the applicant's physical state at the time of his refusal.

In certain circumstances the Code qualifies an employee's right to refuse work:

"128.(2) An employee may not pursuant to this section refuse to use or operate a machine or thing or to work in a place where

(a) the refusal puts the life, health or safety of another person directly in danger; or

(b) the danger referred to in subsection (1) is inherent in the employee's work or is a normal condition of employment."

(emphasis added)

In the instant case, the danger perceived by the applicant stems from his anticipation of stress resulting from interaction with fellow employees. The work of a passenger service attendant (a position Mr. Almeida has held throughout his career in the railway industry) clearly requires frequent contact with fellow employees and passengers. Further, that contact, of necessity, occurs in the relatively confined circumstances of on-board duty and, in the instant case, on-board duty extending to overnight runs.

If any danger were to be found in the circumstances of this case, it could, in the opinion of this Board, only result from inter action between the applicant and fellow employees, which in this particular case is a normal condition of employment.

The applicant requested the Board to address the matter of monetary compensation for damages (unspecified) he may be entitled to.

Part II of the Code only contemplates the possible award of monetary compensation in connection with a proceeding pursuant to section 133(1), where the Board finds that an employer has contravened section 147(a). Upon such a finding the Board's remedial powers under section 134 are triggered:

"134. Where, under subsection 133(5), the Board determines that an employer has contravened paragraph 147(a), the Board may, by order, require the employer to cease contravening that provision and may, where applicable, by order, require the employer to

(c) pay to any employee or former employee affected by the contravention compensation not exceeding such sum as, in the opinion of the Board, is equivalent to the remuneration that would, but for the contravention, have been paid by the employer to that employee or former employee; and

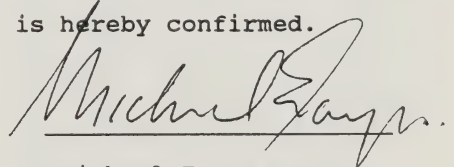
(d) rescind any disciplinary action taken in respect of and pay compensation to any employee affected by the contravention, not exceeding such sum as, in the opinion of the Board, is equivalent to any financial or other penalty imposed on the employee by the employer."

In the instant case there were no allegations or proceedings pursuant to section 133(1) and thus no authority under Part II of the Code for the Board to consider awarding of monetary compensation.

As stated earlier in these reasons, the Board and the parties had before them the full narrative report of the safety officer's investigation. At the hearing, that report was further supplemented by the safety officer's voluntary review (at the applicant's request) of his personal notes concerning the investigation and his decision.

Nothing in the proceedings before the Board revealed any new evidence or element relevant to the case which had not been thoroughly canvassed and considered by Mr. Armstrong (the safety officer) in the course of his investigation.

Having reviewed all the evidence and submissions, the Board agrees with the decision of Mr. Armstrong and is satisfied that no danger within the meaning of Part II of the Code existed on October 26, 1989. Accordingly, the decision of the safety officer is hereby confirmed.

A handwritten signature in dark ink, appearing to read "Michael Eayrs", is written over a horizontal line.

Michael Eayrs
Member of the Board

ISSUED at Ottawa this 20 day of August, 1990.

CLRB/CCRT - 819

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Summary

CANADIAN GUARDS ASSOCIATION,
APPLICANT/PINKERTON'S OF CANADA
LTD.; EMPLOYER/CANADIAN GUARDS
ASSOCIATION, COMPLAINANT/
PINKERTON'S OF CANADA LTD.,
RESPONDENT/CANADIAN GUARDS
ASSOCIATION, APPLICANT/NATIONAL
PROTECTIVE SERVICES COMPANY
LIMITED, EMPLOYER.

Board Files: 555-2833
745-2966
555-2816

Decision No.: 820

These reasons deal with the jurisdiction of the Canada Labour Relations Board over the operations of National Protective Services Company Limited and of Pinkerton's of Canada Ltd. The issue arose in two applications for certification filed by Canadian Guards Association, an association of employees regrouping security guards at the employ of both of these two companies which, inter alia, provide security guard services on the premises of various federal departments or agencies in the national capital area (Ottawa-Hull).

The Board found that it does not have jurisdiction over the operations of these two companies when they provide security services to federal departments or agencies. The two certification applications are dismissed as well as the unfair labour practice application because of lack of jurisdiction.

Résumé de Décision

CANADIAN GUARDS ASSOCIATION,
REQUERANTE/PINKERTON'S OF CANADA
LIMITED, EMPLOYEUR/
CANADIAN GUARDS ASSOCIATION,
PLAIGNANTE/PINKERTON'S OF CANADA
LIMITED, INTIME/L'ASSOCIATION DES
GARDES CANADIENS,
REQUERANTE/NATIONAL PROTECTIVE
SERVICES COMPANY LIMITED,
EMPLOYEUR.

Dossiers du Conseil: 555-2833
745-2966
555-2816

Décision n°: 820

Ces motifs de décision traitent de la juridiction constitutionnelle du Conseil canadien des relations du travail sur les opérations de National Protective Services Company Limited et de Pinkerton's of Canada Ltd. La question s'est soulevée à l'occasion de deux requêtes en accréditation déposées par Canadian Guards Association, une association d'employés regroupant des gardes de sécurité à l'emploi de ces deux compagnies qui, inter alia, procurent des services de gardes de sécurité dans les locaux de divers ministères ou agences fédérales dans la région de la capitale nationale (Ottawa-Hull).

Le Conseil a jugé qu'il n'a pas juridiction sur les opérations de ces deux compagnies lorsqu'elles fournissent des services de sécurité aux ministères ou agences fédérales. Les requêtes en accréditation de même qu'une plainte de pratique déloyale sont donc rejetées à ce chef.



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Reasons for decision

Canadian Guards Association,
applicant,

Pinkerton's of Canada Ltd.,
employer,

Board File: 555-2833

Canadian Guards Association,
complainant,

Pinkerton's of Canada Ltd.,
respondent,

Board File: 745-2966

Canadian Guards Association,
applicant,

National Protective Services Company
Limited,
employer.

Board File: 555-2816

The Board was composed of Mr. Marc Lapointe, Q.C., and of
Ms. Evelyn Bourassa and Mr. Robert Cadieux, Members.

Appearances:

Ms. Paula Turtle, for the applicant and complainant;
Ms. Mary J. Gleason, for employer and respondent
Pinkerton's of Canada Ltd.;
Mr. Walter Langley, for employer National Protective
Services Company Limited.

I

On June 24, 1988, Canadian Guards Association filed with the Board an application for certification to represent all guards in the employ of National Protective Services Company Limited in the Regional Municipality of Ottawa-Carleton, Ontario: a bargaining unit of approximately 280 employees.

On July 20, 1988, the same association filed with the Board a complaint of unfair labour practice against Pinkerton's of Canada Ltd. and on August 5, 1988, it filed an application for certification to represent all guards at the employ of that employer in federal works, undertakings or businesses in the Regional Municipality of Ottawa - Carleton: a bargaining unit of approximately 1,000 employees. The Board received a request to join the two applications for certification and agreed. It has now decided to join the unfair labour practice application and therefore, to dispose of those three applications at the same time.

II

Early in these applications, the matter of constitutional jurisdiction came to the fore because on August 10, the Canada Labour Relations Board, proprio motu, requested from the applicant and both employers, written submissions on the question of constitutional jurisdiction.

One of the employers, namely, National Protective Services Company Limited, had joined the applicant association in expressly conferring jurisdiction to the Canada Labour Relations Board. That employer took issue with the application in the area of appropriateness only. Whereas the applicant suggested a bargaining unit restricted to Ontario and more particularly working in the Regional Municipality of Ottawa-Carleton, the employer suggested that an appropriate unit be composed of all of its employees in the National Capital Region (Ottawa and Hull). It also wanted the unit to encompass part-time employees. The bargaining unit it proposed would have included over 400 employees.

The other employer, Pinkerton's of Canada Ltd., first took the position to ask this Board to suspend all inquiry and proceedings in the application of the association *"until such time as the Ontario Labour Relations Board renders a decision upon the issue of its constitutional jurisdiction over the employees of Pinkerton's of Canada Ltd."*

The Canada Labour Relations Board did not grant such a request, but it is only in December of 1988, that counsel for that employer filed its written representations regarding constitutional jurisdiction. In a nutshell, it pleaded that although it had a multiplicity of clients both "federal" and "provincial", it carries on one indivisible undertaking, and that, based upon a decision of the Ontario Labour Relations Board in National Protective Services Company Limited [1987] O.L.R.B. Report, Feb. 245, it felt that its operations were coming under federal jurisdiction.

It is to be noted that in the proceedings involving it and the association in front of the Ontario Labour Relations Board, Pinkerton's of Canada Ltd. had adopted the position that that Board did not have jurisdiction, inter alia, because this Board had it.

The Canada Labour Relations Board therefore had before it two applications for certification wherein all parties argued that it had constitutional jurisdiction and where its Ontario counterpart had ruled in that same direction.

The problem was that this Board was not convinced it had jurisdiction. It therefore resolved to set down a public hearing restricted to adducing the necessary evidence to ascertain whether or not it had jurisdiction and heard the evidence and arguments of the parties in Ottawa on May 23 and 24, 1989.

III

The facts in these cases may be summarized as follows.

Re: National Protective Services Company Limited
(hereinafter National Protective)

It is a provincial corporation incorporated in Ontario with a license to operate in Quebec as an extra-provincial company. It is in the business of providing security guards services in the Regional Municipality of Ottawa-Carleton and in Hull, Quebec. In June of 1988, that company employed 130 part-time and full-time security guards in the Province of Quebec and 385 in Ontario. There has been, since that time, a substantial increase in the number of guards employed by the company, i.e. approximately 160 in the Province of Quebec and 435 in Ontario.

In Quebec, National Protective must comply with the Act respecting detective or security agencies, R.S.Q. c. A-8, which requires that both the company engaging in the business of providing security guards and the security guards themselves hold a license. In the Province of Quebec, security guards are also subject to the Decree respecting security guards, R.S.Q. 1981, c. D-2, r.1; D-441-84, art. 1 adopted under the Act respecting collective agreement decrees R.S.Q., c. D-2. Approximately a dozen guards employed by the company hold licenses in both Ontario and the Province of Quebec. The only employees of National Protective who work regularly in both provincial jurisdictions are six field supervisors. In Ontario, National Protective must comply with the Private

Investigators and Security Guards Act, R.S.O. 1980, c. 390 which requires that it hold a license to engage in the business.

The evidence demonstrated that about 93% of the total hours worked by the employees of the company were provided to federal government departments or agencies, including Canadian Forces Base (Ottawa), Health and Welfare Canada, Energy, Mines and Resources, Revenue Canada, National Defence, the National Energy Board, the National Energy Control Board, Environment Canada and Consumer and Corporate Affairs. The remaining 7% were provided to other clients such as the City of Ottawa, the Regional Municipality of Ottawa-Carleton and the Ottawa Public Library or in the private sector, such as Jack May Pontiac-Buick and Petro-Canada.

There is no regular rotation of guards between locations, but overtime opportunities occasionally require them to move from a government location to a non-government location and vice versa.

All National Protective security guards services at federal government sites in Ottawa-Carleton, except for those provided to the Department of National Defence at its Canadian Forces Base in Ottawa, are governed by the Department of Supply and Services (DSS) standard form contract entitled the "Departmental Individual Standing Offer" (DISO). DISO sets forth detailed provisions relating to the duties, responsibilities and terms and conditions of employment of the company guards. Counsel for the applicant accurately summarized the essential features of DISO in her written submissions.

DISO sets forth specific and detailed criteria with respect to health, training, appearance, licensing and identification, bonding, age, education, citizenship, language, experience, security clearances and reliability checks with which the company employees must comply. Job specifications are also set forth in DISO. They contain general statements of the duties which National Protective employees must perform and to which the company must agree. The duties are set forth in detail and grouped according to classification. The essential duty performed by all classifications involves controlling the movement of people and material into and out of the federal government buildings. Common duties also include the reporting of suspicious persons, administering first aid, preventing fires, enforcing fire safety standards, searching for and identifying suspect items such as bombs or other threat situations, providing evacuation leadership in fire, bomb or other threat situations, reporting incidents to the federal authorities and arresting any person in appropriate circumstances. All guards are required to exercise emergency security responsibilities and duties. Here is a sample of additional responsibilities which some classifications may be requested to shoulder:

- a) cleaning escort - prevention of theft of classified materials from government offices (garbage or otherwise) by accompanying cleaning staff while the latter perform their duties. In some departments, waste paper may be marked "Top secret" and the guards must insure that such waste is not removed by the cleaners.

- b) non-public guard or patrol person - ensures that only authorized articles are removed from a building, that perimeter and restricted areas are secure and issues passes as required to control the movement of people, material and vehicles.
- c) farm patrol - carries out motorized patrol at the Central Experimental Farm.
- d) public guard - regulates the flow of public visitors into and from federal government premises, prevents the entry into the premises of unauthorized packages, monitors and controls movement of government property, and controls movement of personnel in restricted areas.
- e) information desk, access control or receptionist - regulates the flow of materials and people into and out of federal government premises to prevent unauthorized removal or entry of material or persons.
- f) console operator and voice communicator - logs all phone calls and radio messages, maintains a list of staff entering premises after normal working hours, advises the appropriate government office of important calls, monitors building security, identifies and responds to alarms and acts with outside agencies in alarm situations.

- g) senior guard or shift supervisor - may be required to carry out guard duties in sensitive areas (i.e. the guarding of illegal drugs, employment and taxation buildings), restricted areas and high profile areas (i.e. offices of senior department officials).

The details of a basic training program designed to train National Protective's employees to perform the above mentioned duties are also set forth in DISO.

DSS through a "Guard Quality Assurance Unit" ("GQA") inspects the quality of guard services provided. That unit may advise the federal government of deficiencies in work performed by National Protective employees.

Pursuant to some of the terms of DISO, National Protective is required to employ "patrol officers" called upon to report deficiencies in employee conduct. DISO further provides that the federal government may conduct on-the-job inspections of National Protective's employees to ensure adequate job performance. Where deficiencies in job performance are not rectified by National Protective, it may be considered grounds for default.

National Protective also provides security guard services to Public Works Canada at Place du Portage, a federal government complex in Hull, Quebec. That contract for services is the same as DISO except for some additional services and requirements.

As regards the contract to provide guard services to the Department of National Defence at its Canadian Forces Base in Ottawa, it is governed by a separate contract between DSS and National Protective. Under that contract, security guards must be trained to conduct pre-board security checks. It is to be noted furthermore, that the guards working at the Base are assigned to that contract on a permanent basis.

Re: Pinkerton's of Canada Ltd.
(hereinafter Pinkerton's).

Pinkerton's is a federal corporation which operates in all Canadian provinces except for Newfoundland, Saskatchewan and Quebec. For its Quebec operations, Pinkerton's has a separately incorporated company: Pinkerton du Québec Ltée. Pinkerton's like National Protective is in the business of providing security guards services. The guard services provided by Pinkerton's are similar to those offered by National Protective described above. However, as testified to by Mr. Hellmich, Vice-President, Pinkerton's provides additional security guards services, such as mobile patrol inspectors, investigation services, armed guards and deposit escort services.

Just as National Protective, Pinkerton's must comply in Quebec with the Act respecting detective or security agencies, R.S.Q.C.A.-8 as well as with the Decree respecting security guards, R.S.Q. 1981, c.D-2, r.1; D-441-84, art. 1 adopted under the Act respecting collective agreement decrees R.S.Q., c.D-2. And in Ontario, it must comply with the Private Investigators and Security Guards Act, R.S.O. 1980, c.390.

As of November, 1988, Pinkerton's employed approximately 950 persons out of its Ottawa office, the vast majority of whom work in Ontario whereas Pinkerton du Québec employed approximately 100 persons working in the region of Hull and Western Quebec.

In the National Capital Region, Pinkerton's clients include the federal government, the City of Ottawa, as well as a multitude of clients in the private sector. It remains however that, vis-à-vis the federal government, Pinkerton's is the chief competitor of National Protective.

The nature of the services provided by Pinkerton's varies from client to client and from contract to contract. For example, some locations require the provision of continuous services and others require only regular patrols. The nature and degree of control or influence exercised by Pinkerton's clients over the manner in which security services are provided varies from contract to contract.

Pinkerton's is presently the "second call up" for DISO, providing services only when the "first call up", National Protective, declines to do so.

Of Pinkerton's "permanent clients", for whom continuous onsite security is provided as opposed to patrol and inspection or other services, the percentage of person hours worked on "federal" accounts has, since January 1986, varied on a monthly basis, between 63% and 88%.

Pinkerton's also provides security services of a "temporary" or "casual" nature to a great number of clients, most of whom are "provincial". It provides

security services to numerous clients on a short-term basis (periods of less than three months). The vast majority of these services occur in Ontario for clients of a "provincial" nature.

One specialty of Pinkerton's is the provision of security services in the event of strikes by its clients' employees. Such clients include Canada Post Corporation, Le Droit, Voyageur Colonial Inc., Bell Canada, Kimberley-Clarke and the federal government's Language Training Centre.

As of November 1988, approximately 65 employees of Pinkerton's or of Pinkerton du Québec simultaneously held Ontario and Quebec security guard licenses.

Pinkerton's is a single corporate entity and all of its contracts in the Ottawa region, either of a "federal" or "provincial" nature, are administered by Pinkerton's out of its Ottawa office. It maintains one payroll for all its employees and one invoice and billing system for all its contracts administered out of its Ottawa office. Moreover, it has one single Human Resources and Training Department for all its employees and dispatches employees to all contracts, via dispatchers or assignment officers working out of its Ottawa office. There are three dispatchers who work on a rotating basis and patrol officers who visit all accounts, supervise operations and ensure adherence to post orders.

In practice, there is a significant degree of interchange of employees from one site to another which is brought about by a variety of circumstances. This interchange

involves the assignment of employees from "provincial" to "federal" contracts and vice versa.

There is a Pinkerton's Sudbury office located in Northwestern Ontario. It provides the same type of services as described above: government services, services to private business, etc. A unit of such security guards of Pinkerton's in Sudbury was unionized and eventually certified by the Ontario Labour Relations Board four years ago. The association representing that unit and certified for it is the same as the one in the two instant cases, the Canadian Guards Association.

IV

A. General constitutional principles.

Labour relations are provincially regulated under the heading of property and civil rights under the Constitution Act, 1867: Toronto Electric Com'rs v. Snider et al., [1925] 2 D.L.R. 5; [1925] A.C. 396; and [1925] 1 W.W.R. 785.

By way of exception, however, Parliament may assert exclusive jurisdiction over labour relations if it can be shown that such jurisdiction is an integral part of its primary competence over some other single federal subject: Reference re Industrial Relations and Disputes Investigation Act, [1955] S.C.R. 529, [1955] 3 D.L.R. 721; and (the "Stevedores Reference"). Since the Stevedores Reference, supra it has been clear that Parliament is

empowered to regulate labour relations in those industries that come under federal legislative jurisdiction.

Subsequent to the Stevedores Reference, many cases have revolved around the question of whether or not a particular bargaining unit of employees formed an integral part of an undertaking that was within federal jurisdiction: see for examples Canadian Pacific Railway Company ("Empress Hotel") v. Attorney-General for British Columbia [1950] A.C. 122, and Construction Montcalm Inc. v. The Minimum Wage Commission [1979] 1 S.C.R. 754 ("Construction Montcalm"). See also Canada Labour Relations Board et al. v. City of Yellowknife [1977] 2 S.C.R. 729.

Considering these cases on the basis that provincial competence over labour relations is the rule, and federal competence the exception, the courts have stated that federal competence exists only where it is established that the work performed by the employees is an integral part of an undertaking within federal jurisdiction. And, whether the work performed by the employees is an integral part of a federal undertaking depends upon "...legislative authority over the operation, not over the person of the employer...". (see Canada Labour Relations Board et al. v. City of Yellowknife, supra, at page 736.

As stated by Mr. Justice Beetz in Construction Montcalm, supra,

"...It follows that primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral

element of such federal
competence..."

(page 768)

And as further stated by Mr. Justice Beetz, in order to determine the nature of the operation and to conclude that the undertaking or business is a federal one, one must look at the normal or habitual activities of the undertaking or business as those of a "going concern", without regard to exceptional or casual factors (see Martlin J. in Commission du Salaire Minimum v. Bell Telephone Co. of Canada, [1966] S.C.R. 767; and (1966), 59 D.L.R. (2nd) 145, Letter Carriers' Union of Canada v. Canadian Union of Postal Workers, [1975] 1 S.C.R. 178;(1973); and (1974) 40 D.L.R. (3rd) 105, (the "Letter Carriers' case") and Construction Montcalm, supra, at page 769.

The test of the normal or habitual activities of the business or undertaking as those of a going concern endorsed by Beetz J. in Construction Montcalm, supra, was applied in that case to determine whether a contractor's employees engaged in the construction of an airport's runway were governed by federal or provincial jurisdiction for labour relations purposes. The majority, in reasons drafted by Beetz J., found that provincial law was applicable to Montcalm since the activities of the company, that is, construction, were of a provincial nature and that what it built was merely incidental. The majority in Construction Montcalm, supra, also analysed what constituted an integral part of aeronautics. It found that the construction of an airport is not in every aspect an integral part of aeronautics and that distinctions must be made between what is necessarily federal by virtue of the link with the federal undertaking and what remains

provincial because of the mere incidental connection with said federal undertaking. In this regards, in Construction Montcalm, supra, Beetz J. concluded as follows with respect to the nature of the connection between the work done by the contractor and the federal undertaking:

"...In my opinion what wages shall be paid by an independent contractor like Montcalm to his employees engaged in the construction of runways is a matter so far removed from aerial navigation or from the operation of an airport that it cannot be said that the power to regulate this matter forms an integral part of primary federal competence over aeronautics or is related to the operations of a federal work, undertaking, service or business..."

(page 771).

The Court also focussed on the element of continuity and on the nature of the connection between the federal undertaking and the subsidiary operation, to determine if the latter was an integral part of aeronautics. These criteria are in keeping with the principle that the constitution must be applied with continuity and regularity (see Agence Maritime Inc. v. Conseil canadien des relations ouvrières et al., [1969] S.C.R. 851; and (1969), 12 D.L.R. (3rd) 722; the Letter Carriers' case, supra,) and the rule that labour relations are presumed to fall under provincial jurisdiction. In analysing the nature of the relationship, Beetz J. clearly stated that it is not the particular contract that must be considered, but rather, the operation of the business as a going concern:

"In submitting that it should have been treated as a federal undertaking for the purposes of its labour relations while it was doing construction work on the runways of Mirabel, Montcalm postulates that the decisive factor to be taken into consideration is the one work which it happened to be constructing at the relevant

time rather than the nature of its business as a going concern. What is implied, in other words, is that the nature of a construction undertaking varies with the character of each construction project or construction site or that there are as many construction undertakings as there are construction projects or construction sites. The consequences of such a proposition are far reaching and, in my view, untenable: constitutional authority over the labour relations of the whole construction industry would vary with the character of each construction project. This would produce great confusion. For instance, a worker whose job it is to pour cement would from day to day be shifted from federal to provincial jurisdiction for the purposes of union membership, certification, collective agreement and wages, because he pours cement one day on a runway and the other on a provincial highway. I cannot be persuaded that the Constitution was meant to apply in such a desintegrating fashion.

To accept Montcalm's submission would be to disregard the elements of continuity which are to be found in construction undertakings and to focus on casual or temporary factors, contrary to the Agence Maritime and Letter Carriers' decisions. Building contractors and their employees frequently work successively or simultaneously on several projects which have little or nothing in common. They may be doing construction work on a runway, on a highway, on sidewalks, on a yard, for the public sector, federal or provincial, or for the private sector. One does not say of them that they are in the business of building runways because for a while they happen to be building a runway and that they enter into the business of building highways because they thereafter begin to do construction work on a section of a provincial turnpike. Their ordinary business is the business of building. What they build is accidental. And there is nothing specifically federal about their ordinary business."

(pages 775-776)

In Northern Telecom Limited v. Communication Workers of Canada et al., [1980] 1 S.C.R. 115; (1979), 98 D.L.R. (3rd) 1 ("Northern Telecom No. 1"), the Supreme Court of Canada had to determine if the installation department of Telecom, as a subsidiary operation of Bell Canada's undertaking, formed an integral part of this core federal undertaking or was, rather, a separate and independant undertaking

governed by provincial legislation. Although the Court refused to answer the question for lack of facts generating the determination of constitutional competence, it nevertheless articulated the test which was to be subsequently applied four years later in Northern Telecom Canada Ltd. et al. v. Communications Workers of Canada et al., [1983] 1 S.C.R. 733; and (1983), 147 D.L.R. (3rd) 1 ("Northern Telecom No. 2"). In Northern Telecom No. 1, the Supreme Court endorsed the test set forth by Prof. Paul Weiler in Arrow Transfer Company Limited, [1974] 1 Can L.R.B.R. 29. Mr. Justice Dickson (as he was then), for the majority, stated:

"First, one must begin with the operation which is at the core of the federal undertaking. Then, the courts look at the particular subsidiary operation engaged in by the employees in question. The courts must then arrive at a judgment as to the relationship of that operation to the core federal undertaking, the necessary relationship being variously characterized as 'vital', 'essential' or 'integral'. As the Chairman of the Board phrased it, at pp. 34-5:

'In each case the judgment is a functional, practical one about the factual character of the ongoing undertaking and does not turn on technical, legal niceties of the corporate structure or the employment relationship.'

In the case at bar, the first step is to determine whether a core federal undertaking is present and the extent of the core undertaking. Once that is settled, it is necessary to look at the particular subsidiary operation, i.e., the installation department of Telecom, to look at the 'normal or habitual activities' of that department as 'a going concern', and the practical and functional relationship of those activities to the core federal undertaking."

(pages 132 - 133; and 14)

And in examining the relationship of the undertakings, the Court found the physical operational connection between them to be a very important factor. In this regard, it endorsed the judgment in Construction Montcalm, supra, which stressed that there was a need to look to continuity and regularity of the connection and not to be influenced by exceptional or casual factors. Dickson J. stated it this way:

"...Mere involvement of the employees in the federal work or undertaking does not automatically import federal jurisdiction. Certainly, as one moves away from direct involvement in the operation of the work or undertaking at the core, the demand for greater interdependence becomes more critical."

(page 135; and 15; emphasis added).

In summary, among the constitutional facts that the Supreme Court of Canada considered necessary to focus on to address the constitutional issues, it referred to the following:

1. The general nature of the subsidiary's operations as a going concern and, in particular, the role of the department focussed on within that operation.
2. The nature of the corporate relationship between the subsidiary operations and the companies or undertakings that it serves, notably the federal undertaking.
3. The importance of the work done or the services provided by the subsidiary operation for the federal undertaking as compared to its other customers.

4. The physical and operational connection between the subsidiary operation and the core federal undertaking, and in particular, the extent of the involvement of the operation with the federal undertaking as an operating system.

Then Northern Telecom No. 2, occurred.

In reasons that concur with those of the majority, Mr. Justice Dickson examined each of the main four constitutional facts set forth in Northern Telecom No. 1, to determine whether Northern Telecom's installation department formed an integral, vital and essential part of Bell Canada, the federal undertaking.

1. With respect to the general nature of Northern Telecom's operation as a going concern and, in particular, the role of the installation department within the operation, Dickson J. concluded that although Northern Telecom's core manufacturing operations were conceded to fall under provincial jurisdiction, there would be nothing artificial in concluding that its installers came under a different constitutional jurisdiction. The installers, he found, had nothing to do with the actual manufacturing of equipment and they never actually worked on Northern Telecom's premises. In respect of Bell Canada, the installation was primarily done on Bell Canada's own premises and not on the premises of Bell Canada's customers.

2. With respect to the nature of the corporate relationship between Northern Telecom and the companies that it served, notably Bell Canada, Dickson J. concluded

that the fact that Bell Canada controlled Northern Telecom made it somewhat easier to conclude that a segment of Northern Telecom's operations was an integral part of Bell Canada's operations.

3. On the importance of the work done by the installation department of Northern Telecom for Bell Canada as compared with other customers, Dickson J. concluded that Northern Telecom's involvement with Bell Canada was clearly a predominant part of the work of the installers, and that in that regard, it met the test for federal jurisdiction set out in Letter Carriers', supra, and Construction Montcalm, supra. The work of the installers of Northern Telecom for Bell Canada was neither an exceptional nor a casual factor.

4. Finally, on the question of the physical and operational connection between the installation department of Northern Telecom and the core federal undertaking within a telephone system and, in particular, on the extent of the involvement of the installation department of Northern Telecom in the operation of the federal undertaking as an operating system, Dickson J. concluded that there was clearly a connection between the Northern Telecom installers and Bell Canada, the core federal undertaking. However, he had to address the question of whether this was sufficient to displace the prima facie presumption that labour relations are a matter of provincial competence. And he concluded that the installers' work was not preliminary to the operation of Bell Canada's undertaking. For him, their work was an integral part of Bell Canada's operations as a going concern. He put it thus:

"...In this overall context, installation is not the end of the manufacturing process. It is not even properly described as the beginning of the operation of the federal undertaking. It is simply an essential part of the operations process..."

(pages 773; and 7)

Furthermore, Dickson J. endorsed the following conclusion stated by Mr. Chief Justice Thurlow in the same case in the Federal Court of Appeal

"But the feature of the case that appears to me to be of the greatest importance and to point with telling effect to the conclusion that the jurisdiction is federal is the fact, as I see it, that what the installers are doing, day in day out, during 80% of their working time, is participating in the carrying on of the federal undertaking itself which by reason of its nature requires a constant program of rearrangement, renewal, updating and expansion of its switching and transmission system and the installation of telecommunication equipment designed to carry out that need. With 80% of the work these installers are doing on continuing basis being work done in Bell's undertaking, I am of the opinion that there is a foundation for the assertion of federal jurisdiction over their labour relations and that the Board should assume and exercise it in accordance with the Canada Labour Code. Further, in my view, the fact that 20% of the installers' work is not done for Bell does not change the conclusion."

(page 7774; and 7)

However, although concluding that the installers came under federal jurisdiction, Mr. Justice Dickson did note that this case was very close to the boundary between federal and provincial jurisdiction.

As we know, Mr. Justice Beetz dissented in this case and he noted that:

"At best 'the case was nicely balanced' as Le Dain J. put it in the Federal Court of Appeal [123 D.L.R. (3d) 483 at p. 492, [1982] 1 F.C. 191, 37 N.R. 145]. "...If it be so, then what should tip the balance is not the ongoing or regular character of the work of the installers, which cannot be assimilated to maintenance. Nor is it the fact that the work of the installers is an indispensable requisite to the operation of the federal undertaking, which does not make it part of the operation. What should tip the balance in a 'nicely balanced' case is, in my view, the general rule of provincial competence."

(pages 779; and 11).

Going back to the 1975 case of Letter Carriers', supra, the outcome was more obvious. The company involved had contracts (mainly highway service routes) with Canada Post for the delivery and collection of mail. The duties performed by the employees of the company on behalf of Canada Post involved the responsibility for delivering and sorting mail, the custody of keys permitting access to post offices and the collection of monies due on C.O.D. parcels. The control exercised over these employees by the Post Office was described as follows:

"Each company employee termed 'carrier' is provided with an identification card supplied by the Post Office, and is required to carry this at all times while on duty. In addition, the Post Office supplies to each carrier a book, or pamphlet, of instructions or regulations, covering the performance of his duties".

(pages 183; 108 and 109).

Ritchie J. writing for the Supreme Court of Canada found that the work performed by these employees was essential to the operations of Canada Post and was carried out under the supervision and control of the Post Office authorities. To determine whether the trucking company involved was

sufficiently integrated with the core federal undertaking to come within federal jurisdiction, Ritchie J. endorsed the test put forth by Mr. Justice Estey in the Stevedores Reference, supra:

"If, therefore, the work of stevedoring, as performed under the foregoing contracts, is an integral part or necessarily incidental to the effective operation of these lines of steamships, legislation in relation thereto can only be competently enacted by the Parliament of Canada.

That the work of the stevedores is an integral part would seem to follow from the fact that these lines of steamships are engaged in the transportation of freight and the loading and unloading thereof, which would appear to be as necessary to the successful operation thereof as the enbussing and debussing of passengers in the Winner case, [1954] A.C. 541. The loading would, therefore, be an integral part of the operation of these lines of steamships and, therefore, subject to the legislative jurisdiction of Parliament."

(pages 186; and 110).

One other case is important to be referred to as establishing major tenets of constitutional jurisdiction.

In Canadian Airline Employees' Association v. Wardair Canada (1975) Ltd et al., [1979] 2 F.C. 91; and (1979), 97 D.L.R. (3rd) 38 ("Wardair"), the Federal Court of Appeal had to determine whether persons employed by a wholesaler as customer representatives were subject to federal legislative authority because the wholesaler acted as a resaler of the passenger seating capacity of an air carrier.

The Court held that these employees were subject to provincial legislative authority because, although the services they provided were reasonably incidental to the federal activity, they were not essential to the operations

of that federal undertaking. Mr. Justice Jackett reasoned as follows:

"...A particular activity may be reasonably incidental to the operation of a federal work, undertaking or business without being an essential component of such operation. For example, an interprovincial railway may have its own laundry facilities or its own arrangement for preparing food for passengers, or, alternatively, it may send its dirty linen to an outside laundry or buy prepared food. Generally speaking, where such an activity is carried on by the operator of the federal work, undertaking or business as an integral part thereof, it is indeed a part of the operation of the federal work, undertaking or business. Where, however, the operator of the federal work, undertaking or business carries on the operation thereof by paying ordinary local businessmen for performing such services or for supplying such commodities, the business of the person performing the service or preparing the commodities does not thereby automatically become transformed into a business subject to federal regulation..."

(pages 96 - 99; and 43).

Mr. Justice Jackett followed the reasons given in *Cannet Freight Cartage Ltd.*, [1976] 1 F.C. 174; (1975), 60 D.L.R. (3rd) 473; 11 N.R. 606. And he differentiated the facts in *Wardair, supra*, from the facts in the *Stevedores Reference, supra*, by explaining that in the latter case, the operations performed by the stevedoring companies were an essential part of what was involved in carrying goods by sea or "shipping", whereas in *Wardair, supra*, Intervac's (the wholesaler) customer representatives performed no comparable part of the air carrier's core federal activity of carrying passengers by air.

B. Other interesting jurisprudence

1. In Re City of Kelowna and Canadian Union of Public Employees, Local No. 338, (1974) 42 D.L.R. (3rd) 754, the Supreme Court of British Columbia had to determine whether employees of the municipality working at the Kelowna Airport were employees governed by provincial legislation or not.

The Court first found that the Kelowna Airport was a federal undertaking. It then examined the functions of said employees to determine if they were essential to the operation of the airport and, accordingly, an integral part of the operation of the airport. Three employees were engaged in the maintenance of the airport. More specifically, they attended to the maintenance of the runway. The Court found that such functions were essential to the safe and proper operation of the airport. The fourth employee was a secretarial assistant to the airport manager. The latter was bound to keep records of airport revenues as well as of aircraft movements and maintenance and such other records as federal government authorities could prescribe. The Court concluded that such administrative work was an essential part of the operation of the federal undertaking.

Accordingly, the Court found that these employees worked as airport employees, not as municipal employees. As their work was considered an integral part of the operation of the airport, they were held to be employees

falling within federal jurisdiction for the purpose of labour relations.

2. In Toronto Auto Parts (Airport) Limited, [1978] O.L.R.B. Rep. July, 682, the company involved was under contract with the federal government to manage some public parking facilities owned by said government at Toronto International Airport. Under the terms of the contract, Toronto Auto Part was responsible for the operation of the parking facilities and of a luggage cart retrieval service. On the issue of constitutional jurisdiction over the activities of that company, the Ontario Labour Relations Board concluded that the services provided by the company's employees were not sufficiently integral to aeronautics to bring them within federal legislative jurisdiction.

3. In Reliable Window Cleaners (Sudbury) Limited, [1982] O.L.R.B. Rep. Nov. 1714, the Ontario Labour Relations Board found that the cleaning services contracted by a nuclear refinery to Reliable Window were not essential or integral to the federal work or undertaking. In reaching its conclusion, the O.L.R.B. relied on the Wardair case, supra, and found that the employees had no direct involvement with the operations of the refinery or the handling of any prescribed substance. Their functions were limited to providing cleaning services to the nuclear refinery's administration and services buildings.

"...In our view, while these services are reasonably incidental to the Eldorado's refinery operation, they are not an essential or integral part of it. Instead, they are analogous to the examples referred to in the Wardair case of laundry and food services being supplied by an outside firm..."

(page 1717).

4. In Blue Water Bridge Duty Free Shop Inc., [1988] O.L.R.B. Rep. Feb. 109, at issue was the constitutional jurisdiction over Blue Water Bridge's duty free shop located on federal government land. The Ontario Labour Relations Board found that the existence and operation of the duty free shop was not so integrally connected to the federal undertaking (the operation of a Canadian border crossing) that it ought to be found to be within federal jurisdiction. It was clear that the operation of a duty free shop was not in any way necessarily integral to the operation of a border crossing. In fact, the border crossing had existed and operated fully much prior to the setting up of any duty free shop at that location. The O.L.R.B. noted that although the federal government had large control over the physical aspect of the business, it had very little, if any control or influence, over the labour relations aspect of the duty free shop.
5. In Service d'Entretien Avant-Garde Inc. v. Canada Labour Relations Board (1986), 26 D.L.R. (4th) 331, the Quebec Superior Court held that the activities of a company under a contract

with Air Canada to clean two of its buildings at Mirabel Airport, were not vital or necessarily incidental to the aeronautic operations of Air Canada. They were not an integral part thereof.

It was also found that the cleaning operations in question were inseparable from the company's sole activity of cleaning and to have in themselves nothing at all to do with any area which comes within the legislative jurisdiction of the government of Canada.

6. In Marathon Realty Co. Ltd. (1977), 25 di 387; [1978] 1 Can L.R.B.R. 493; and 78 C.L.L.C. 16, 138 (C.L.R.B. no. 117), the Canada Labour Relations Board found that janitorial services contracted out by Canadian Pacific Limited were not an integral part of that federal undertaking's operation.

V

Application of the principles of the cases under study

On the basis of the principles or tests laid down in the jurisprudence referred to in the preceding chapter and in line with further jurisprudence dealing more specifically with security guards services for labour relations purposes which has already dealt with such services and which shall be commented upon in more details below in these reasons for decision, the Board, in order to determine whether it has constitutional jurisdiction over the employees involved

in the two applications for certification and the unfair labour practice application under study, must examine the businesses by whom these employees are employed. If these undertakings are core federal undertakings, then the Board has primary constitutional jurisdiction over the employees in question.

If these undertakings are not federal, the Board must determine if they are nonetheless federally regulated by virtue of secondary jurisdiction. In such a case, that determination rests upon an affirmative answer to the question, whether the operations of these undertakings are vital, essential or integral to a core federal undertaking.

The review of the leading cases above indicates that in order to make such a finding, a number of steps must be gone through. The Board must

1. examine the operation which is alleged to be a core federal undertaking:

a) is there a core federal undertaking?

b) what is the extent of that core undertaking?

2. study the particular subsidiary operations engaged in by the employees in question. To that end, the following questions must be addressed:

a) what is the general nature of the subsidiary operations as a going concern and, in particular, what is the role of the services focussed upon within those operations? Here, the Board must

disregard casual or exceptional factors in the activities involved.

b) what is the nature of the corporate relationship between the subsidiary operations and the companies it serves, notably the federal undertaking?

c) what is the importance of the services provided by the subsidiary operations for the federal undertaking as compared to their other customers?

i) Assessment of whether the services provided by the subsidiary operations to the federal undertaking constitute a predominant part of that company's activities;

ii) Assessment of whether the relationship between the subsidiary operations and the core federal undertaking is a continuous one.

d) what is the physical and operational connection between the subsidiary operations and the core federal undertaking and, in particular, what is the extent of the involvement of the subsidiary operations in the operations of the federal undertaking?

i) In this regard the Board must examine the extent of the employee's involvement in the federal undertaking:

- are they integrated?

- do they participate in the operations of the federal undertaking itself?
- who exercises supervision and control over the employees: the subsidiary operations or the federal undertaking?

ii) In this regard the Board must also examine the degree of operational integration of the subsidiary operations to the federal undertaking:

- are the services necessary or even important to the federal undertaking?
- are such services necessarily incidental to the federal undertaking or are they merely incidental to it?

As was stated by McGuigan J. in *Re Canada Labour Code* [1987] 2 F.C. 30, concluding upon the two Northern Telecom cases:

"...the critical factor in determining constitutional jurisdiction in such cases is the 'macro-relationship' between the subsidiary operation and the core federal undertaking. The facts of this relationship should be examined from a functional, practical point of view, and for federal jurisdiction to be established (1) there must be a high degree of operational integration and (2) it must be of an ongoing nature. Construction Montcalm, therefore, must also be interpreted in this light."

a) Primary jurisdiction

It cannot be disputed that security guards services are not in themselves federally regulated as they do not fit under any of the heads of Section 91 of the Constitution Act, 1867 which would make them subject to federal jurisdiction. Rather, they fall under Section 92 (13) and/or Section 92 (16) under the heads "Property and Civil Rights in the Province" and "Matters of a merely local or private nature in the Province" which give provinces the power to regulate businesses of a local and/or private nature.

In this regard, it is in evidence that both Ontario and the Province of Quebec have exercised their powers to regulate security guards services by enacting relevant legislation requiring that security guards obtain licenses to perform such services. The labour standards which apply to security guards in the Province of Quebec are even governed by a statutory regime which is of public order (Decree respecting security guards - referred to above).

It is therefore clear that both National Protective and Pinkerton's businesses are of primary provincial jurisdiction.

b) Secondary jurisdiction

Having found that National Protective and Pinkerton's businesses are provincial, we must now consider if they are nonetheless federally regulated by virtue of secondary jurisdiction. Let us look at the tests.

1. What is the operation which is alleged to be a core federal undertaking?

In these cases, many core federal undertakings are involved. They are the various federal government departments and agencies and other federal undertakings such as banks, museums, broadcasting corporations, etc. for which both Pinkerton's and National Protective provide security guards services.

2. Particular subsidiary operation engaged in by the employees in question.

a) What is the general nature of the subsidiary operation as a going concern? What is the essence of the services focused on within that operation?

Both National Protective and Pinkerton's are in the business of providing security guards services. Both companies provide traditional security guards services which include access control, security patrols, first aid and emergency responses to bomb threats, fire alarms, arresting people who commit criminal offences, and guarding sensitive or restricted areas.

These services are essentially similar to those enumerated in the definitions of security guards found in both the Ontario and Quebec statutes. Under the Private Investigations and Security Guards Act of Ontario, supra, the term "security guard" means "a person who, for hire or reward, guards or patrols for the purpose of protecting persons or property" (Section 1(g) of the Act). And in the Quebec Decree respecting security guards, supra, security

guards Class "A" and "B" are defined as follows at paragraph 1.01:

"1.01 e) Class A employee: an employee who does the work determined by the employer, without the intermediary of a higher class and also who is specially assigned to one of several of the following tasks:

- i) informs persons on how to reach their destination;*
- ii) watches over the employees of one of the employer's clients;*
- iii) directs traffic;*
- iv) gives out information*
- v) writes out traffic tickets;*
- vi) patrols;*
- vii) checks passes;*
- viii) collects and registers found objects;*
- ix) supervises to prevent theft of objects on display;*
- x) carries out searches;*
- xi) prevents theft, fire and vandalism".*

"1.01 f) Class "B" employees: an employee entrusted with the direction and supervision of one or several employees in Class "A".

National Protective and Pinkerton's also both offer additional services designed to meet special needs. Thus, National Protective provides security guards trained to conduct aircraft pre-boarding passenger screening services. Pinkerton's provides armed guards services, mobile patrols and deposit escort services for guarding automated bank machines.

However, the evidence adduced demonstrates that these additional services are managed separately from the rest of both companies' activities.

b) What is the nature of the corporate relationship between the subsidiary operation and the companies that it serves, notably, the federal undertakings?

Both National Protective and Pinkerton's having an arm's length relationship with the federal undertakings which they serve, this element is of no significance in rebutting the presumption of provincial jurisdiction.

c) What is the importance of the services provided by the subsidiary operation for the federal undertaking as compared to its other customers?

The evidence demonstrates that when the application for certification was filed, the percentage of person hours worked by National Protective on federal accounts was 93%. As for Pinkerton's, it was shown to vary between 63% and 88%. The services provided by the two companies to the federal undertakings therefore constitute a predominant part of their respective activities. Furthermore, the evidence shows that the relationship between these companies and core federal undertakings is a continuous one.

d) What is the physical and operational connection between the subsidiary operation and the core federal undertaking and, in particular, what is the extent of the involvement of the subsidiary operation in the operation of the federal undertaking?

i) Extent of the employees involvement in the federal undertakings.

ii) Degree of operational integration of the subsidiary operation into the federal undertaking.

As to National Protective.

There is no regular rotation of National Protective's guards between locations and only a dozen guards hold licenses in both Quebec and Ontario. However, National Protective's guards working at the Canadian Forces Base in Ottawa are assigned to that contract on a permanent basis. National Protective's guards services are mainly governed by the terms and conditions of DISO which sets forth numerous obligations as to the standards of quality that must be met by the guards working for the federal government departments and agencies. And although, under DISO, the federal government reserves control over the training, job definitions and some work rules of National Protective's guards, the latter company still exercises fundamental control over its employees. And even under DISO, National Protective is responsible for the direct supervision of the guards as well as for their assignments to work sites and for scheduling their work days and work hours. The uniforms are provided by the company which uses its regular design. Training methods are the responsibility of the company although it is a prerequisite of the contract that guards working at federal government sites pass the government's basic training program. National Protective employees are paid by the company in accordance with provincial rates. Furthermore, the fact that the federal government sets high standards of quality

for the guards ensuring the safety of its premises does not, per se, imply that it exercises fundamental control over such employees. It only means that the government attempts to ensure that it will obtain the services at the quality it has contracted for. For example, the obligation contained in DISO that security guards follow a basic training program is simply one of the means chosen to achieve this result. A similar obligation could be found (and probably is found) in provincial government contracts for the supply of identical services.

As to Post Orders, explained in evidence, they are only specific orders pertaining to a particular post. They lay out what are the government's needs at a particular location. This, again, is not evidence of material or fundamental control nor of integration, but are merely detailed contract requirements.

However, the fact that some guards must obtain security clearance may be indicative of a certain form of control being exercised by the federal government over those employees. The requirement for security clearance evidences the existence of a relationship between those individuals and the government.

However, the nature of that relationship need not be limited to employment. Indeed, the government may contract out services which must be performed at highly sensitive government premises. In such cases, the government has a right to require that these outside persons, meet the same security clearance standards as those that are expected of government employees. It is our opinion that that requirement is but another contract prerequisite. In that

sense, it is not different from other contractual obligations that require the compliance of the employees with the safety code or the plant rules of a business when working on location. Therefore, we find that the fact that some government locations require that guards working there obtain security clearance has no material impact on the nature of their relationship with the core federal undertaking.

None of the obligations we have discussed above have anything to do with any of the essential features of the operations of the various federal departments or agencies that are being protected by National Protective's security guards. Competence and reliability are not standards of work which are unique to the federal government.

Nothing in the evidence adduced leads to the conclusion that National Protective's employees were and are integrated to or participating in the operation of the undertakings of any of the various federal departments and agencies that they guard, except for one.

It has to do with National Protective's guards assigned to work at the Canadian Forces Base in Ottawa. These guards provide aircraft pre-boarding passenger screening security services for the Department of National Defence. We shall comment further in those reasons on the situation of that group of employees of National Protective.

As to Pinkerton's

On the basis of the evidence before the Board as regards that company, we cannot conclude that its employees are

integrated to or participating in the operation of any core federal undertaking or that any federal undertaking exercises substantial supervision and control over Pinkerton's employees.

ii) Degree of operational integration of the subsidiary operation into the federal undertaking.

This is the most critical factor in determining constitutional jurisdiction but it is highly subjective. However, as indicated by Beetz, J. in Northern Telecom No. 2, supra, where the relationship is "a nicely balanced one" the presumption in favour of provincial jurisdiction should apply. In this regard see also A.T.M. Automatic Teller Machines Services Ltd. v. Teamsters Local Union no. 213 et al, 22 D.L.R. (4th) 282 (leave to appeal to the Supreme Court of Canada refused December 16, 1985) which could also be interpreted as implicitly following that rule.

The guard services provided to the federal undertaking do not substantially vary from one site to the other or from one contract to the other. Certain features or duties may be added in some agreements depending upon additional needs of the client or of the location.

And the very essence of all the services provided is access control and, although such services may be important or even necessary to federal undertakings, it cannot be said that these services change significantly depending on the client to whom they are provided.

Whether the services are requested to protect sensitive areas such as taxation buildings, restricted areas and high

profile areas such as senior department officials' offices, there is nothing vital, essential or integral in these guard services to the core federal undertaking functions and operations. For instance, guard functions are not vital or essential to nor are they integral to taxation or the operations of museums, although guard services are necessary to the operation of such core federal undertakings.

Drawing an analogy with Beetz J.'s reasoning in Construction Montcalm, supra, at pp. 775 - 777, we cannot say of security guards that they are in the arts business because for a time (for the term of a contract and we even concede the element of continuity in our cases), they provide security services to museums, or that they have entered into and are in the mining business because they provide security guards services at the offices of Energy, Mines and Resources. Their ordinary, ongoing business, is the business of access control. To whom they provide such guard services is incidental. The same services are provided to all National Protective and Pinkerton's customers. There is nothing going to the core of a federal undertaking about their ordinary business.

For these reasons, we conclude that the security guards services provided by both these companies to various federal undertakings, though necessary, are merely incidental to the operations of such undertakings. And these services are not vital, essential or integral to the core federal undertakings.

There may however be some services which bear closer scrutiny. For instance in the case of National Protective,

as regards the situation prevailing at the Canadian Forces Base in Ottawa and guard services provided to it by that company. Such services, as we have seen above, include inter alia the pre-boarding screening and frisking of passengers. That is a function that is integral to the core federal undertaking of aeronautics. The security guards working at the base do not simply control access to the Base's buildings. They are involved with detection equipment, performing these functions pursuant to the regulations of the Aeronautics Act. Accordingly, the services that they then provide are vital, essential and integral to the core federal undertaking.

As to Pinkerton's, this company in some instances provides security guards services in the form of mobile patrol inspectors, armed guards services and deposit escort services for its clients in the banking business. At first glance, such services appear closely linked to the federal undertaking of banking. They are certainly necessary. But are they so essential and vital to the function of banking that it makes them an integral part of banking?

The B.C. Court of Appeal concluded in the negative in Automatic Teller Machines, supra, when it found such services were not an integral part of banking. The special nature of those services was not found to be inclusive because it can be said to relate more to the security guard ongoing business of the undertaking than to that of banking. The fact that the services provided are somewhat special does not entail that they are essential, vital or integral to the core federal undertaking of banking. Rather they are special security needs required by the undertaking, i.e. banking. The same special security needs could be required by a jewellery store or an auction

without having anything to do with the core undertakings of jewellery selling or auctioneering, per se.

As a general conclusion, we therefore conclude that there is not enough evidence of services integrated operationally with the various core federal undertakings to oust the primary provincial competence presumption. Pinkerton's operations just as National Protective's at the various federal undertakings are not within the jurisdiction of this Board.

VI

As was mentioned above in these reasons, one of the employers in these two applications for certification, namely, National Protective Services, was involved before the Ontario Labour Relations Board. In 1986 a certification application covering apparently the same group of its employees as that which is encompassed by the certification application in front of this Board was pending before the O.L.R.B. It had met that application by alleging lack of constitutional jurisdiction. It argued that it was in the federal jurisdiction. In National Protective Service Company Limited, [1987] O.L.R.B. Rep. Feb. 245, the O.L.R.B. agreed with the employer.

This obviously led the organized employees of that employer to file with this Board the application under study. It also enticed the same labour organization to file vis-à-vis a group of security guards working for Pinkerton's and providing services in buildings in the Ottawa-Hull geographic area where departments of the federal government have some offices.

In paragraph 13 of National Protective Service Company Limited, supra, Vice-Chairman, Robert D. Howe had written:

"...Counsel for the respondent submitted that all of the aforementioned security guard services provided by the respondent [the employer] to the Federal Government are integral or necessarily incidental to Federal Government works and undertakings. Counsel for the applicant, on the other hand, contended that those services are not an integral or essential part of Federal Government operations. He acknowledged that any tenant needs security services, as such services are essential to the operation of a building. However, he argued that such services are not essential or integral to any of the heads of federal jurisdiction under sections 91 and 92 (10) of the Constitution Act."

(page 249).

In paragraphs 14 and 15, he went on:

14. "In an unreported decision dated June 2, 1982 (in C.L.R.B. File No. 555-1757), the Canada Labour Relations Board found that it had constitutional jurisdiction over security employees of Burns International Security Services Limited working at the Gander International Airport in Gander, Newfoundland, and certified the International Association of Machinists and Aerospace Workers as their bargaining agent. We respectfully agree with that conclusion, and find the same to be true of the respondent's [the employer] employees who provide pre-board passenger screening security services for the Department of National Defence at its Canada Forces Base in Ottawa. In this age of 'sky-jacking' and terrorist activities involving airplanes, their crews, and their passengers, it cannot legitimately be said that pre-board passenger screening security services are a mere convenience. To the contrary, they clearly have a vital, essential, integral, important, and intimate role in aeronautics, which is a well established area of federal jurisdiction. This reasoning applies with even greater vigour to military aeronautical operations,

such as those carried on at the Canadian Forces Base in Ottawa, in view of the federal power over 'Militia, Military and Naval Service, and Defence', under section 91(7) of the Constitution Act.

15. Having regard to all of the evidence and the submissions of the parties, we have also concluded that constitutional jurisdiction over labour relations between employers and employees who provide security guard services of the type described above on a regular and ongoing basis to departments and agencies of the Federal Government also fall within the ambit of federal jurisdiction. The tasks performed for Federal Government departments and agencies by the respondent's employees, such as the evacuation of buildings in fire/bomb threat situations, the arrest of persons committing criminal offences, the guarding of sensitive areas such as taxation buildings, restricted areas, and high profile areas (such as senior departmental officials' offices), and the operation of control rooms in normal and emergency situations, play a vital, essential, integral, important, and intimate role in the operation of those departments and agencies, and are necessarily incidental to such operations, which fall within various heads of federal power under section 91 of the Constitution Act, such as 'The Public Debt and Property', under section 91(1A); 'The raising of Money by any Mode or System of Taxation', under section 91(3); and the Federal Government's 'Peace, Order, and Good Government' general or residuary power."

(Pages 249 - 250; emphasis added)

Thus, it is partly because of reliance by the Ontario Labour Relations Board upon an unreported decision of the Canada Labour Relations Board, Burns International Security Services Ltd., June 2 1982, that the applicant association and National Protective Services took the position in one of the cases under study, that this Board had jurisdiction. The June 1982 CLRB decision in question adopted the form of a letter decision and here is the sum total of said letter.

"A quorum of the Board composed of James E. Dorsey, Vice-Chairman, Hugh Jamieson and Lorne Shaffer, Members, has granted the above-described application.

The Board has not considered it necessary to conduct a hearing in this case, having satisfied itself that it has constitutional jurisdiction in this matter and having further satisfied itself that a clear majority of the employees of the employer in the unit, wish to be represented by the applicant.

You will find enclosed the Order issued by the Board in both official languages."

The certification order read:

"all security employees of Burns International Security Services Limited working at the Gander International Airport, Gander, Newfoundland, excluding the general supervisor and those above."

Unfortunately, although this Board is in complete agreement with the conclusion arrived at by the O.L.R.B. in paragraph 14 cited above, concerning those employees of National Protective Services represented by the applicant association and assigned to work at the Canada Forces Base in Ottawa, it respectfully disagrees with the conclusion arrived at by the O.L.R.B. in paragraph 15 cited above as regards the rest of the employees of National Protective Services encompassed by the bargaining unit sought by the applicant association. The same applies mutatis mutandis to the Pinkerton's application.

A review of the Canada Labour Relations Board decisions, ante 1973 and since, concerning functions of security, becomes à propos.

As we will see, the Canada Labour Relations Board (old and new) never wrote very much as to its jurisdiction over the work of security guards.

The vast majority of decisions had to do with the inclusion in or exclusion from bargaining units regrouping other employees of an employer, of some employees of the same employer, performing guard functions. And in almost all cases, there were no reasons for decision dealing with this jurisdiction.

Of that ilk, we find these cases disposed of by our predecessors. Alberta Nitrogen Products Limited, July 1944, before the War Time Labour Relations Board (National), file 7512.59; Bicroft Uranium Mines Limited, February 1957, file 766:716:56; Can-Met Explorations Limited, August 1957, file 766-806; Millikon Lake Uranium Mines Limited, August 1957, file 766-807; Northspan Uranium Mines Limited, October 1957, file 766-812; Can-Met Explorations Limited, August 1958, file 766-902:58; Stanrock Uranium Mines Limited, December 1957, file 766-829; AMF Atomics (Canada) Limited, October 1958, file 766-912; Venus Mines Limited (N.P.L.) Carcross, Y.T., October 1970, file 7-66-2369. Security guards were excluded from the units sought after and in all of those applications, the employees performing security guard duties were employees of the companies involved.

The reconstituted present C.L.R.B. issued its first decision concerning employees involved in the providing of security guards services in September of 1973 in Canadian Pacific Police Association and Canadian Pacific Security

Guards Association, Board file S-1, which was a transfer of certification from a bargaining agent to another with the concurrence of the employer. The employees in question were employees of Canadian Pacific Limited.

In Atomic Energy of Canada, July 1974, file 555-236, and in Trans Western Express, September 1974, file 555-270, the Board excluded the security guards employees of these employers from the bargaining unit; in Denison Mines Limited (1975), 8 di 13; [1975] 1 Can LRBR 313; and 75 CLCC 16,150 (CLBR No. 38), the Board agreed to a separate bargaining unit of employees of the mine providing security guard services in the uranium industry at Elliot Lake. In Imperial Roadways Ltd., August 1975, file 555-411, the Board excluded employees of the employer performing security guard duties. The same remarks would apply to Overnite Express Limited, April 1980, file 555-1326, and to Inter-City Trucklines (Canada) Inc., May 1980, file 555-1376. In these last three cases, security guards, employees of the employers, were excluded from a bargaining unit of drivers. The same situation applied in Husband Transport Limited, August 1979, file 555-1241.

In CFTO-TV Limited, (1981), 45 di 306 (CLRB No. 345) the Board created a separate bargaining unit of employees of the employer providing security services. In Canada Ports Corporation (1985), 54 di 246 (CLRB No. 507), the Board certified in a same unit, employees of the Corporation providing security guard services with a white collar unit. In CKVR Channel 3 Limited, May 1986, file 530-1341, the Board excluded from the unit all of the employees of the employer performing security guard services. The same in Transport d'Anjou Inc., Transport Cabano Inc., in June

1987, files 560-223 and 585-131, where the Board excluded from a unit of all the employees of those employers, their employees providing security guard services. The same in Loomis Courier Service Ltd., Metro-Express Division, in August 1988, file 555-2794, where the Board excluded from an all employee unit, those employees of the employer providing security guard services. The same in Canadian Broadcasting Corporation, in January 1989, file 555-2857, where the Board granted certification to a unit of security guards employed by CBC in the City of Ottawa. No reasons for decision. In Cape Breton Development Corporation (1989), as yet unreported CLRB decision No. 736, the Board sanctioned the merging of a unit of employees of the Corporation providing security guard services with a certified supervisory group.

Finally, in Automobile Transport Inc., in July 1989, file 530-1741, the Board excluded from a unit of all employees of the employer, its employees providing security guard services.

The first time this Board alluded to its jurisdiction in that area was in December of 1978. In Eastern Provincial Airways (1963) Ltd. (1978), 29 di 44; and [1979] 1 Can LRBR 456

"These cases involve two competing applications to represent the same group of employees, namely, a group of security guards of the respondent, Eastern Provincial Airways (1963) Limited..."
...

The employer has contested both applications on the following grounds. First of all, it contends that the security guards are not employees as defined by the Code, as they are employed in a confidential capacity in matters relating to industrial relations. This is based on the interpretation of the employer as regards the work performed by

the security guards and mainly because their duties consist of:

- 1) screening passengers emplaning on the employer's aircraft in accordance with section 5.1 of the Aeronautics Act;
- 2) protecting the employer's property and prevention of fire;
- 3) prevention of public intrusion upon the employer's property and theft of the employer's property by the public;
- 4) monitoring all the employer's employees in relation to theft. In this connection, security guards have authority to check and search the person and possessions of employees while on the employer's premises;
- 5) inspecting all aircraft that terminate their flight plans at Gander and to check for shortage of inventory;
- 6) inspecting commissary supplies;
- 7) conducting special investigations of cases of observed theft or alleged theft committed by either employees or the public; and
- 8) other investigations relating to industrial relations."

One notes that the employees involved in these two competing applications were employees of Eastern Provincial Airways, that they were providing security services and that the operations were those of that employer at the International Airport in Gander. The Board's reasons for decision in that case do not deal at all with the constitutional jurisdiction of the Board over security guard functions at an airport. However, there is reference in the above quote to the screening of passengers emplaning on the employer's aircrafts in accordance with section 5.1 of the Aeronautics Act. But the Board did not comment on that specifically.

Then came the June 1982 letter decision of Burns International Security Services Ltd, supra referred to with approval in National Protective Services Company Limited, supra, by the Ontario Labour Relations Board. It had to do with security guard functions at the Gander International Airport being performed by employees of Burns. Not by employees of an airline company whose core undertaking falls squarely within this Board's jurisdiction.

The Board's discussion concerning constitutional jurisdiction was reduced to the passage in the quote of the entire letter decision (see p. 43 above) which reads:

"The Board...having satisfied itself that it has constitutional jurisdiction in this matter..."

More recently, in Agence Sécurité Nord-Ouest du Québec Inc. in May 1985, file 555-2255 a union representing all security guards of said company working at the Val d'Or airport was certified by the Board. No reasons for decision.

In February of 1986, Société de Protection et Enquête du Québec (SOPEQ) Aéroport de Québec file 555-2339 a unit of security guards working for that employer at the Quebec Airport was certified by the Board. No reasons for decision.

In July of 1986, in Metropol Base-Fort Airport Security Services file 555-2480 and in Metropol Base-Fort Airport Security Services file 555-2486 the Board certified units of employees of this employer at the Edmonton International

Airport and at the Calgary International Airport. No reasons for decision in either case.

In Canadian Protection Services Ltd. January 1988, file 555-2717, the Board certified "all pre-boarding screening security guards employed by that company at the Calgary International Airport". No reasons for decision.

Finally, in Burns International Security Services Ltd. and Canada Post Corporation (1989), 3 CLRBR (2d) 264 (CLRB No. 746), the Board came to the conclusion that the employees of that employer providing security guard services to Canada Post Corporation did not come within the constitutional jurisdiction of the C.L.R.B. That last decision of the Board contained the first real in depth discussion as to its jurisdiction over security guard functions.

However, the reasons for decision of this Board in Burns International Security Services Ltd. and Canada Post Corporation, supra, was not available to the Ontario Labour Relations Board when it issued its decision in National Protective Services Company Limited, supra, in February of 1987, using reliance upon Canada Labour Relations Board jurisprudence which never analyzed the extent of the federal jurisdiction in that area to justify its declining of jurisdiction and concluding that this Board had jurisdiction.

Curiously enough it is the Tribunal du Travail of the Province of Quebec which commented first upon the jurisdiction of the Canada Labour Relations Board over some security guards operations. In Agence de Sécurité Fortin

Inc. and Union des agents de sécurité du Québec, Local 924 et al. [1981] 3 Can L.R.B.R. 271, (Qué.) Mr. Justice J. Girouard overturned a decision by a labour commissioner who had certified, under the Quebec Labour Code, a union representing a group of security guards employed by Agence de Sécurité Fortin Inc. an undertaking to which Air Canada had given a contract on its own behalf and that of several other air carriers using the airports of Dorval and Mirabel in the Province of Quebec.

In substantial reasons for decision Girouard J. did establish in what circumstances security guard services provided by an undertaking to a core federal undertaking could make the labour relations involved in the operations of that providing undertaking, fall under federal jurisdiction.

And these reasons for decision were in existence both in June 1982 when this Board issued Burns International Security Services Ltd, supra, and in February 1987 when the Ontario Labour Relations Board issued National Protective Services Company Limited, supra.

One unfortunate consequence of this situation is that a considerable number of employees (security guards) who have opted, back in 1986, to have their working conditions governed by collective bargaining, as they have a right to do under both the Ontario Labour Relations Act, the Quebec Code and the Canada Labour Code, have been denied up to recently, the exercise of this right, because of uncertainty over the appropriate forum to deal with their wish.

These reasons for decision, together with recent judgments by the Courts, as well as the reasons for decision issued by this Board in Burns International Security Services Ltd, and Canada Post Corporation, supra, will hopefully go a long way in clarifying this issue of constitutional jurisdiction. It is probably why in a case of Ontario-Hydro - Bruce Power Development Services file 555-2959 in July of 1989, this Board was asked to grant leave to withdraw an application for certification by the International Union United Plant Guard Workers of America. Counsel for the applicant union based its request to withdraw its application upon the fact that in the meantime, the constitutional question had been resolved in favour of the provincial jurisdiction and that the Ontario Labour Relations Board had certified that union.

As for the recent reasons for decision recently issued (May 1989) by this Board in Burns International Security Services Ltd. and Canada Post Corporation, supra, this panel of the Board is in complete agreement with the rationale and conclusions arrived at by the Board as to its constitutional jurisdiction regarding secondary jurisdiction over enterprises involved in operations of security and providing services to core federal undertakings.

With respect, however, this panel is of the opinion that the criteria identified and developed by the Courts and analysed above in these reasons for decision are sufficient and authoritative for the determination of jurisdictional competence. The new additional criteria of "general services" as opposed to "specific services" appear to this panel as being fraught with difficulties.

VII

There are two matters remaining to be dealt with.

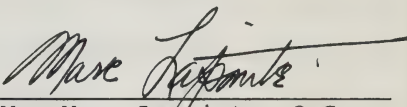
Firstly, the federal core undertakings involved in these applications could use their own employees to provide themselves with the security guard services which they have contracted out to private enterprises. If they were using their own employees, the latter might not come under the jurisdiction of this Board but they could very well be considered as coming within the federal jurisdiction ambit. Further, the contracting out must be at complete arm's length. The applicant in these two cases have produced evidence that the core federal undertakings involved had retained sufficient control over the working conditions of the employees involved that the true employers would be the said federal undertakings. The evidence however was not conclusive, although being of substance.

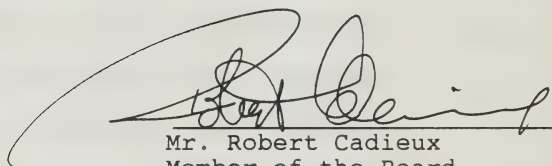
Secondly, the Board, in these reasons, kept referring to the exceptional situation existing as regards those employees of National Protective affected to service at the Canadian Forces Base in Ottawa. There is no doubt that, per se, these employees come within the federal jurisdiction and therefore within the competence of this Board.

They were encompassed in a larger bargaining unit proposed by the applicant as appropriate. The fate of that application having been determined, the employees in

question together with their association may now decide the course of action they will adopt.

These two applications for certification and the unfair labour practice accompanying one of them are therefore dismissed because in our respectful opinion they are not within the jurisdiction of this Board.

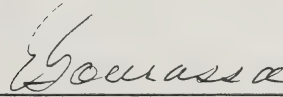

Mr. Marc Lapointe, Q.C.
Chairman


Mr. Robert Cadieux
Member of the Board

Partial dissent by Member Evelyn Bourassa

"Having been a Member of the panel of the Board that rendered the decision in Burns International Security Services Limited and Canada Post Corporation, supra, I feel obliged to comment on the reference to the 'additional criteria' which my colleagues appear to believe flow from that decision (see page 55). It is my view that no new criteria were established in the Burns International Security Services Limited decision. All the panel did there was to fully explain why the operations of Burns International Security Services Limited were not an integral or essential part of Canada Post Corporation. The use of the word 'general' as opposed to 'specific' services

was merely an in-depth analysis of the facts within the framework of the criteria developed by the courts vis-à-vis the essential elements as compared to the non-essential elements of the services being supplied to the core federal undertaking. In all other respect, I concur with this decision."

A handwritten signature in cursive script, appearing to read "E. Bourassa", is written over a horizontal line.

Mrs. Evelyn Bourassa
Member of the Board

DATED in Ottawa, this 29 th day of August, 1990

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Summary

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS, APPLICANT, CANWEST PACIFIC TELEVISION INC. (CKVU), RESPONDENT, AND JANICE TALBOT AND OTHERS, INTERVENORS.

Board file: 530-1608

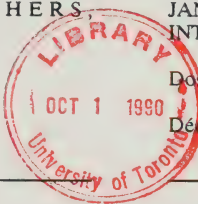
Decision No.: 821

Résumé

L'ASSOCIATION NATIONALE DES EMPLOYÉS ET TECHNICIENS EN RADIODIFFUSION, REQUÉRANTE, CANWEST PACIFIC TELEVISION INC. (CKVU), INTIMÉE, AINSI QUE JANICE TALBOT ET AUTRES, INTERVENANTS.

Dossier du Conseil: 530-1608

Décision n°: 321



This decision deals with an application pursuant to section 18 of the Canada Labour Code (Part I - Industrial Relations), filed by the National Association of Broadcast Employees and Technicians (NABET), seeking to have the Board review and extend its certification at CanWest Pacific Television Inc., a television station (CKVU) located in Vancouver.

NABET seeks to add various positions to the bargaining unit which covers virtually every department of CKVU. It is not the Board's practice to hold hearings into applications filed by a single bargaining agent seeking an overhauling of its certification. However, in this particular case, the Board decided to hold a public hearing following the interventions of a group of employees who were invoking the protection of the Charter of Rights and Freedoms. At the hearing, the Board instructed counsel that it only required evidence on certain positions sought by the union as well as on the Charter argument.

The intervenors, fully supported by the employer, challenged the application on two grounds. First, since the union did not seek their support, if they were to be swept into the bargaining unit without the Board ordering a vote, this would violate section 2(d) of the Charter. Second, they contend that the Board is without jurisdiction to entertain this application under section 18 of the Code.

According to the Board, witnessing one's position being added to a bargaining unit does not violate one's freedom of association. The Board further reiterated its jurisprudence that its review power can be used to add employees to a bargaining unit without violating one's freedom of

La décision qui suit porte sur une demande présentée en vertu de l'article 18 du Code canadien du travail (Partie I - Relations du travail) par l'Association nationale des employés et techniciens en radiodiffusion (NABET), en vue de faire réexaminer et élargir son accréditation à l'égard de CanWest Pacific Television Inc., soit la station de télévision CKVU, à Vancouver.

NABET tente de faire ajouter certains postes à l'unité de négociation qui comprend presque tous les services de CKVU. Le Conseil n'a pas pour pratique de tenir d'audiences lorsqu'il s'agit de demandes présentées par un seul agent négociateur en vue d'une révision de son accréditation. Cependant, en l'espèce, le Conseil a décidé de tenir une audience publique en raison des interventions présentées par un groupe d'employés qui invoquent la protection de la Charte des droits et libertés. À l'audience, le Conseil a demandé aux avocats de ne produire des éléments de preuve que sur certains postes visés par la demande et sur l'argument concernant la Charte.

Les intervenants, qui sont entièrement appuyés par l'employeur, contestent la demande pour deux raisons. En premier lieu, puisque le syndicat n'a pas tenté d'obtenir leur appui, leur inclusion dans l'unité de négociation sans que le Conseil ordonne la tenue d'un scrutin enfreindrait l'alinéa 2d) de la Charte. En deuxième lieu, ils prétendent que le Conseil n'a pas compétence pour examiner leur demande en vertu de l'article 18 du Code.

D'après le Conseil, l'inclusion d'un poste dans une unité de négociation ne porte pas atteinte à la liberté d'association du détenteur de ce poste. Le Conseil a passé en revue les décisions dans lesquelles il a dit qu'il peut, aux termes de son pouvoir de réexamen, ajouter des

association. The intervenors' Charter argument was dismissed.

The Board concluded that 11 positions were covered by NABET's collective agreement.

postes à une unité de négociation sans porter atteinte à la liberté d'association des individus. L'argument concernant la Charte invoqué par les intervenants est rejeté.

Le Conseil conclut que 11 postes sont assujettis à la convention collective de NABET.

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Reasons for decision

National Association
of Broadcast Employees
and Technicians,

applicant,

CanWest Pacific
Television Inc. (CKVU),

respondent,

and

Janice Talbot and
others,

intervenors.

Board File: 530-1608

The Board was comprised of Mr. Serge Brault, Vice-Chairman, and Mr. Calvin Davis and Ms. Ginette Gosselin, Members.

Appearances:

Messrs. John Rodgers and John Hodgins, for the National Association of Broadcast Employees and Technicians, assisted by Mr. Charles Shewfelt, President, and Ms. Michelle Vollman, Director, NABET Local 830;

Ms. Joan McEwen and Mr. R. Alan Francis, assisted by Mr. Barry Duggan, Executive Vice-President and General Manager, for the employer;

Mr. Irwin G. Nathanson, Q.C., and Ms. Leslie Howett, for the intervenors.

These reasons for Decision were written by Mr. Serge Brault, Vice-Chairman.

This is an application pursuant to section 18 of the Canada Labour Code (Part I - Industrial Relations), filed by the National Association of Broadcast Employees and

Technicians (NABET), seeking to have the Board review and extend the certification it has with CanWest Pacific Television Inc. (the employer or CKVU), a television station located in Vancouver, B.C. NABET's certification was initially issued for a group of employees represented by an independent union. At the time CanWest was known as Western Approaches Ltd.

I

The Background

NABET took over as bargaining agent at CKVU in 1985. Following a union successorship application filed pursuant to now section 43 of the Code, it took over the certification issued in 1979 to the CKVU Employees Association (the Association). As is evidenced in documents filed before this panel, the certification followed negotiations between the Association and the employer, leading to a joint application that the Board certify the Association for a unit agreed upon by the parties. These negotiations provided for a somewhat extensive list of 56 exclusions. According to the Board's files, at the time of certification the employer had an overall work-force of 146, including management. That certification reads as follows:

"all employees of Western Approaches Limited, employed at CKVU Television, Vancouver, British Columbia, excluding President, Vice-President, Controller, Program Manager, Chief Accountant, Credit Manager, Productions Manager, Film Editing Manager, Technical Services Manager, Chief Engineer, Design Director, Commercial Production Manager, Executive Producer, Production Manager, Traffic Manager, General Sales Manager, Retail Sales Manager, Unit Manager, Payroll Accountant, Commissioned Sales Persons, Confidential Secretaries, Contract Employees, Producers, Directors, Technical

*Directors, Area Supervisors, Writer/Producers,
and Casual Part-time employees."*

The evidence heard indicates that when management negotiated the scope of the bargaining unit with the Association, at least two positions occupied by officers involved in the negotiations for the union ended up on the exclusions list. Moreover, the Association's president was listed as a management employee on correspondence exchanged between the Board and the employer back in 1979. For undisclosed reasons, it seems that following certification, that person remained in the unit even though the employer alleges today that the position he occupied fell outside of the scope of the bargaining unit as being a management position.

The original certification file does not contain any job description pertaining either to the inclusions or to the exclusions. No reasons for decision were issued by the Board, and the certification order was sent to the parties with a standard covering letter. No reference is made to what was the considerations of the Board when it certified the Association for the unit it did. For no reason apparent in the file, at the time of issuance, the certification order and the covering letter were sent to NABET as well as the IBEW, even though they did not appear as interested parties to the proceedings. We can only speculate that there may have been at the time an organization drive involving more than one would-be bargaining agent.

What all this boils down to is that some 10 years ago a panel of the Board more or less rubber-stamped an agreed-upon unit. In so doing, albeit indirectly, the Board

still implicitly found the above unit to be appropriate for collective bargaining:

"27(2). In determining whether a unit constitutes a unit that is appropriate for collective bargaining, the Board may include any employees in or exclude any employees from the unit proposed by the trade union."

It is also worth noting that, at the time it filed this application, NABET filed another application, pursuant to section 35 of the Code, where it sought a single employer declaration to cover a subsidiary of CKVU known as Carnaval Productions Inc. (file 580-54). NABET alleged that under the guise of a distinct corporation, CKVU had artificially divided its operations with the effect of depriving employees of their legitimate bargaining rights. While that application was still pending, Carnaval's activities, which all took place in CKVU's installations and under its management, were wound up and officially integrated into CKVU's. All Carnaval personnel were either terminated or integrated in CKVU's official workforce. That file has since been closed.

In 1985, prior to NABET's taking over as bargaining agent, the Association was involved in a long dispute with CKVU, which led to a difficult strike, at least in the eyes of the union, if not of the employer. It lasted two and a half months and finally led the Association to turn over to NABET.

At the time of the hearing, NABET and CKVU had yet to sign their first collective agreement following NABET's takeover. The last collective agreement between CKVU and the Association was a two-year contract signed following the 1985 strike.

Back in July 1987, a little more than a month prior to the termination of the agreement, NABET gave CKVU notice to bargain. The instant application for review was filed a year later, in September 1988.

Hearings took place in June and August 1989.

II

The Application

The positions the union seeks to add to its unit are numerous and cover all CKVU departments. We list these positions below using the department names found in the Board officer's report. We also name the incumbents of these positions in the summer of 1989 as we can best reconstitute that list from the numerous documents filed with the Board throughout these proceedings. We indicate in brackets the former job title, to which CKVU argues the new title is the equivalent.

A. OPERATIONS AND ENGINEERING

1. Assistant Manager, Engineering (chief engineer)
(D. Nelson)
2. Assistant Manager, On-Air (area supervisor)
(O. Eichel)
3. Scheduling Clerk (area supervisor/studio)
(D. Marr)
4. Secretary (confidential secretary)
(G. Paiement)
5. Technical Directors (2) (same)
(G. Marling and G. Poole)

B. SALES DEPARTMENT

1. Secretary (confidential secretary)
(A. Hansen)

C. ACCOUNTING DEPARTMENT

1. Payroll Clerk (personnel payroll administrator)
(D. Cramer)
2. Payroll Assistant (payroll clerk assistant)
(H. de Haan)
3. Accounting Clerk, receivables (same)
(D. Svoboda)
4. Accounting Clerk (Carnaval) (chief or senior
(C. Richards) accountant)
5. Accounting Clerk, payables (accounts payable
(T. Van der Graaf) manager)

D. TRAFFIC DEPARTMENT

1. Traffic Manager (same)
(P. Paul)
2. Traffic Coordinator (accounting clerk)
(T. Banks, part-timer)

E. NEWS DEPARTMENT

1. Assignment Editor and Business Manager (same)
(D. MacLachlan)
2. Assignment Editor (same)
(T. Morris, acting)
3. Administrative Assistant (confidential
(K. Shimbashi) secretary)
4. Studio Directors (4) (director)
(D. Stewart, T. Brady, P. Mills and J. Michel)
5. Managing Editor - News (managing editor)
(S. Wyatt)
6. Sports Director (sports director/host)
(P. Carlson)
7. Producers (5) (same)
(D. Budge, A. Boa, S. Jasper, A. Girney and
J. Akazuki)
8. Hosts (4) (same)
(D. Abbott, R. Froese, D. Miller and
S. Josephson)

F. PROMOTIONS AND PROGRAMMING DEPARTMENT

1. Program Assistant (assistant program director)
(J. Talbot)
2. Announcer (host, writer, producer/announcer)
(E. Friend)
3. Promotions Manager (same)
(B. Millar)

4. Senior Writer/Producer, Commercial (supervisor
(C. Zygmunt) writer/prod.)
5. Writer/Producer, Commercial (same)
(D. Adams)

G. ART AND CARPENTRY DEPARTMENT

1. Design Director (design & property manager)
(E.T. Knight)
2. Make-up Artists (2) (same)
(S. Dennis and K. Meyer)

Following the application, both parties filed lengthy submissions. Also, the 36 individuals who occupied the positions sought by the union filed an intervention. The issues raised in that intervention are discussed further on.

It is not current practice for the Board to hold hearings into applications such as this one, involving a single bargaining agent seeking to overhaul its certification. The issue is quite similar to that of certification where, based on job descriptions and written submissions, the Board can normally come to a final determination on the appropriateness issue and on the precise description of the bargaining unit.

At the very outset of the proceedings both parties were notified that the Board could dispose of this application without a hearing. They were invited to make full submissions in writing as well as to reply to each others' submissions. Later, the Board's investigation officer filed his report with the Board and sent it to the parties with the following invitation:

"In the event the information contained in this report does not reflect the positions of any of the respective parties, that party is requested to communicate with me ..."

When the Board decided to hold a hearing, it explicitly invited the parties to meet prior to it to try and iron out some of the outstanding issues:

"The Board invites the parties to meet with [its officer] ... to review each and every outstanding position in an effort to settle as many of the disputed positions as possible.

The Board still reserves the right to determine any or all of the disputed positions without a hearing. If that is the case, the parties will be so notified after March 22nd."

The decision to hold a public hearing in this case was in fact largely influenced, if not totally determined, by the interventions of employees who are invoking the protection of the Charter of Rights. They strongly requested that the Board hold a hearing, if only to address the Charter issue, insisting that it be decided in limine litis.

As it turned out, the Board had to cancel the first hearing set in this file. A second hearing was scheduled, but was cancelled at both parties' request. Again on that occasion, the Board invited the parties to meet and offered the good offices of its investigating officer, but to no avail. The Board notified the parties of the new hearing dates, and invited them again to meet for the same purpose. They did not. As is explained later on, the employer discarded the idea of holding any discussion with NABET, given the opposition of the incumbent employees to their addition to the bargaining unit. At the beginning of the hearing in Vancouver on June 12, 1989, the Board informed the parties that it was not intent on letting them embark upon a lengthy exercise, since it felt that in view of the evidence already on file, it could decide the issue on all but a few of the positions in dispute.

There again we invited the parties to sit together, at least to try and sort out the real issues. At that point, counsel for CKVU officially notified the Board of her client's instructions not to engage in any discussion with the union over these matters. Ms. McEwen added that her instructions called for her to challenge each and every allegation made by the union. She suggested that in so doing her client made very clear its unqualified support of the individual employees' motion under the Charter of Rights.

After having considered all material on file and these introductory arguments, the Board instructed counsel that it did not require evidence on all positions sought for inclusion and that the parties were to focus on the following issues.

- A. Evidence pertaining to the alleged managerial responsibilities of the incumbent of the four following positions:
 - 1- Assistant Manager, Engineering (D. Nelson)
 - 2- Assistant Manager, On-Air (O. Eichel)
 - 3- Chief or Senior Accountant (C. Richards)
 - 4- Promotions Manager (B. Millar)
- B. Evidence pertaining to the alleged casual employee status of T. Banks, the traffic coordinator
- C. Evidence pertaining to the alleged contract employee status of announcer E. Friend, and of the two make-up artists, S. Dennis and K. Meyer

D. Evidence pertaining to the alleged exclusion from the original certification of the accounting department as a whole

E. On the part of the union, evidence on the appropriateness of including in the unit the supervisory personnel, given it was specifically excluded back in 1979

The day following the issuance of these directions, Mr. Francis, counsel for the employer, stated that they had reflected on the matter and felt that the Board's directions on evidence constituted an unfair restriction of his client's rights. He asked the Board to reconsider and to allow any evidence the parties might see fit.

After a break to review the matter, the Board declined to do so for the following reasons.

First, the Board considered it had ample evidence on file; second, CKVU had not done all it could reasonably do to help these proceedings progress. The Board particularly inquired of management whether it could explain why it suddenly felt it needed time to call evidence on other matters before us when, at the time, it had received the investigation officer's report it had not made any comment on its accuracy and content; why it had declined in every instance to meet with the Board's investigation officer prior to any hearings; and why it had not reacted when notified that the Board expressly reserved the right to decide this matter without a public hearing.

As it turned out, even though we had identified the questions requiring evidence, the parties were given a lot

of room to enlarge upon various issues, such as the history of certification, job descriptions of positions in existence at the time of certification, explanations on the operations of many if not all departments of the station. The employer chose not to call as witnesses most of the incumbents of the positions sought for inclusion, with the exception of a few. For its part, the applicant only called its president, Charles Shewfelt, while none of the intervenors testified.

III

The Interventions

This application was filed with the Board on March 31, 1988. As is a standard practice in this type of case, the Board had the application posted in the workplace in the following weeks. On June 3, 1988, counsel, stating that he had been retained by 21 of the 36 employees sought for inclusion, requested intervenor status on their behalf. He added that he had reason to believe the 15 remaining employees would retain his services. Counsel sought to challenge the application as being outside of the jurisdiction of this Board and in contravention of section 2(d) of the Charter of Rights and Freedoms.

At the time, counsel had not filed with the Board, as required under section 9(2) of its Regulations, the written authorizations from his clients appointing him as counsel. It was only at the Board's formal request that such documents were filed in June 1989. The documents consisted of standard forms filled out in the name of individual employees and signed in May 1988, some three months after the posting of the application. The Board

was later told that counsel for the intervenors was in fact retained and paid for by management.

Evidence and Argument

To review in detail the description of each and every position sought by the applicant would serve no purpose. Suffice it to say that voluminous written submissions supplemented by oral evidence, as well as documentation submitted by each counsel, were considered. Further, the Board has had the opportunity to review its file on the original certification. All this material provided the necessary information to dispose of this application.

Insofar as argument is concerned, the parties filed lengthy submissions as well as case law in support of their respective views. Counsel for NABET focused his argument on the lack of appropriateness of the bargaining unit initially certified. Such weakness would be further evidenced, in his view, by the current situation, where several employees are, for different reasons, deprived of bargaining rights. He added that the addition of supervisory personnel to the unit was appropriate.

With respect to the issue of union support, counsel for NABET characterized it as not relevant where no change is sought to the fundamental nature of the bargaining unit, adding that such was the case here. NABET recognizes that it has not tried to organize the employees whose positions are sought for inclusion in its bargaining unit.

Counsel Hodgins went on to say that the main thrust of his client's application is to have its certificate interpreted, in which case employee wishes are immaterial.

As an alternate argument, relying partly on Teleglobe Canada (1979), 32 di 270; [1979] 3 Can LRBR 86; and 80 CLLC 16,025 (partial report) (CLRB no. 198), he insisted that majority support in the overall unit, as opposed to majority in the added portion, is sufficient. He argued that the Board has discretion to adapt Teleglobe Canada, supra, guidelines and that it should not view employees initially left out as a separate entity where a vote could be ordered.

Counsel nonetheless conceded that supervisory personnel could be isolated for the purpose of union support and that the Board might want to order a vote before adding these positions to the unit.

The intervenors, fully supported by the employer, challenged the application on two grounds. First, since the union did not seek their support, if they were to be swept into the bargaining unit without the Board ordering a vote, it would violate section 2(d) of the Charter of Rights and Freedoms.

"2. Everyone has the following fundamental freedoms:

...

(d) freedom of association."

Second, they contend that the Board does not have jurisdiction to entertain this application under section 18 of the Code:

"18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application."

For its part, the employer led evidence to establish that most of the positions sought by NABET existed at the time of certification and were specifically excluded. Relying on the union's admission that it had not tried to organize the employees whose positions it is now seeking, counsel argues that the Board cannot properly add them to the unit. Counsel insisted that the reason NABET now seeks an extension of its bargaining unit is to gain more clout at the bargaining table and that such considerations do no warrant the remedy NABET is requesting.

IV

The Current Certification

NABET is seeking an overhauling, through section 18 of the Code, of the certification issued to an independent union in 1979. This case presents an unusual characteristic. NABET wishes to update a certification it inherited through a takeover pursuant to section 43(1) of the Code:

"43.(1) Where, by reason of a merger or amalgamation of trade unions or a transfer of jurisdiction among trade unions, a trade union succeeds another trade union that, at the time of the merger, amalgamation or transfer of jurisdiction, is a bargaining agent, the successor shall be deemed to have acquired the rights, privileges and duties of its predecessor, whether under a collective agreement or otherwise."

(emphasis added)

This provision is to be distinguished from section 36(1) applicable in a raid situation where an incoming union ousts, through a certification of its own, an incumbent bargaining agent:

"36.(1) Where a trade union is certified as the bargaining agent for a bargaining unit,

...

(b) the certification of any trade union that was previously certified as the bargaining agent for any employees in the bargaining unit is deemed to be revoked to the extent that the certification relates to those employees; and

(c) the trade union so certified is deemed to be substituted as a party to any collective agreement that affects any employees in the bargaining unit, to the extent that the collective agreement relates to those employees, in the place of the bargaining agent named in the collective agreement or any successor thereto."

As is evidenced by these provisions, in the case of a raid, the newcomer is only substituted to the union being ousted "as a party to a collective agreement," whereas in the case of section 43 the incoming union steps into the outgoing one's shoes with respect to all its rights, privileges and duties, "whether under a collective agreement or otherwise." For our purpose, in the context of this section 18 application, we find that NABET, having chosen the road of section 43 to obtain its bargaining agent status, we have to consider the situation as if the certificate NABET wants to update had been issued to it back in 1979. Accordingly, we cannot give any decisive weight to the suggestions that the union officers were more or less tricked into the concessions they made at the time of certification.

The Board's file shows that NABET's certification was issued following negotiations between the parties. At the time, the Board chose to fulfil its obligation with respect to the issue of appropriateness under what is now section 28(b) of the Code, by simply accepting the parties' agreement.

"28. Where the Board

...

(b) has determined the unit that constitutes a unit appropriate for collective bargaining, ..."

Amongst the material filed with the Board at the time of certification (file 555-1120) was a written agreement whereby the union consented to the following:

"February 1st, 1979

Mr. F.R. Lysack
Canada Labour Relations Board
1090 West Pender Street
12th Floor
Vancouver, B.C.
V6E 2N7

Dear Sir:

RE: Your File No. 555-1120

Please be advised that agreement has been reached between the company and the CKVU Staff Association that the following groups of employees will not be included in the bargaining unit.

- A) All Executive and Department Managers to include,
President
Vice-President
Controller
Program Manager
Chief Accountant
Credit Manager
Productions Manager
Film Editing Manager
Technical Services Manager
Chief Engineer
Design Director
Commercial Production Manager
Executive Producer
Production Manager
Traffic Manager
General Sales Manager
Retail Sales Manager
Unit Manager
Payroll Accountant.
- B) All Commission Sales Personnel.
- C) All confidential secretaries who have access to corporate reports, labour records and confidential corporate correspondence. These are to include the following:

Secretary to the President
Secretary to the Vice-President
Secretary to the Controller

Secretary to the Sales Manager
Secretary to the Chief Accountant
Secretary to the Production Manager.

D) All employees who have contracted with Western Approaches Limited.

E) Those employees considered to be supervisory and have the authority to recommend the hiring and/or firing of staff. This area to include the following:

Producers
Directors
Technical Directors
Area Supervisors
Writers/Producers

F) Those employees considered to be casual part-time.

Hoping this meets with your approval, we remain.

Yours very truly,

WESTERN APPROACHES LIMITED
CKVU-TV

(signed)
President

CKVU Staff Association

(signed)
President

BFD/ik"

According to the Board officer's report filed on February 16, 1979, there were no casual or part-time employees at the time, even though the parties wanted them excluded. The officer also noted in his report that the resulting unit was considered by the parties "to be appropriate for collective bargaining."

We understand NABET's concern that the current bargaining structure is not the best; this being said, we cannot turn the clock back. Conversely, we cannot give to any certification issued in such circumstances an intended scope that, rightly or wrongly, it was not meant to have (Bell Canada (1981), 46 di 90; and [1982] 1 Can LRBR 274 (CLRB no. 355)). Particularly, we have to assume that the

parties did not want to ignore the Code or to extend or narrow its meaning beyond what Parliament intended it to mean. Good faith has to be presumed on both sides. Since no past job description is available, we have to assume that, at the time, those excluded as managers were actually managers and not employees under the Code; likewise, that those excluded as being employed in a "confidential" position were indeed so employed and did not qualify as "employees" under what is now section 3:

"'employee' means any person employed by an employer and includes a dependent contractor and a private constable, but does not include a person who performs management functions or is employed in a confidential capacity in matters relating to industrial relations."

Finally, given what is now section 27(5) of the Code, we finally have to assume that the exclusion of supervisors indeed applied to persons who actually held supervisory positions and that it was done in the name of appropriateness and surely not because they were not employees under the Code:

"27.(5) Where a trade union applies for certification as the bargaining agent for a unit comprised of or including employees whose duties include the supervision of other employees, the Board may, subject to subsection (2), determine that the unit proposed in the application is appropriate for collective bargaining."

The same holds true for the commission sales personnel that cannot have been excluded on grounds other than lack of appropriateness.

In brief, the parties cannot escape the fact that they agreed upon the unit or the consequences of that agreement.

The intended scope of CKVU's initial certification, with the exception of the commission sales personnel, was all non-supervisory staff. As for the confidential and managerial positions, they are not excluded as such, but rather positions that do not allow for their incumbents to be unionized because their responsibilities disqualify them as employees under the Code. The Board need not exclude managers or so-called confidentials from bargaining units, it just cannot include them. As a first step in these proceedings, we need to determine whether or not, as management alleges, all positions sought by the union fall outside its current certification. If some were not to be excluded, then we would need to address other issues.

A) Non-employees positions on the basis of confidential duties as they relate to industrial relations

The three positions in dispute that would come under this heading are the following.

1. Secretary to Director of Engineering and Operations
(G. Paielement)
2. Secretary (Sales Department)
(A. Hansen)
3. Administrative Assistant (News)
(K. Shimbashi)

In each case, the employer argues that the incumbent's responsibilities meet the test set out by the Board in Bank of Nova Scotia (Port Dover Branch) (1977), 21 di 439; [1977] 2 Can LRBR 126; and 77 CLLC 16,090 (CLRB no. 91), where the Board had this to say:

"To this end this Board and other Boards have developed a three-fold test for the confidential

exclusion. The confidential matters must be in relation to industrial relations, not general industrial secrets such as product formulae (e.g. Calona Wines Ltd., [1974] 1 Canadian LRBR 471, headnote only (BCLRB decision 90/74)). This does not include matters the union or its members know, such as salaries, performance assessments discussed with them or which they must sign or initial (e.g. Exhibit E-21). It does not include personal history of family information that is available from other sources or persons. The second test is that the disclosure of that information would adversely affect the employer. Finally, the person must be involved with this information as a regular part of his duties. It is not sufficient that he occasionally comes in contact with it or that through employer laxity he can gain access to it. (See Greyhound Lines of Canada Ltd. (1974), 4 di 22, and Hayes Trucks Ltd., [1974] 1 Canadian LRBR 284.)"

(pages 460; 136; and 537)

Not one of the incumbents of the three positions in dispute has testified. A close look at the responsibilities listed under their title in their current job descriptions leads us to find that they do not qualify under section 3 of the Code as holding a confidential position relating to industrial relations and, with all due respect, none has a degree of involvement in labour relations that could even remotely be characterized as sensitive. As the Board said in Sunwapta Broadcasting Limited (1981), 43 di 218 (CLRB no. 309):

"... Further, the positions concerned have little or no industrial relations involvement, and the infrequent and superficial duties which might touch upon labour relations are not considered by the Board to be of sufficient consequence to justify exclusion of the incumbents on the basis of their performing duties of a confidential nature in respect to labour relations."

(page 222)

- B) Non-employee positions on the basis of managerial functions

The next positions we have to consider are those four described as managerial, thereby preventing their incumbents from qualifying as employees under the Code. Such would be the case of the following positions; CKVU directly described them as managers or the current equivalent to positions initially equated to managers or executives.

1. Assistant Manager, Engineering (D. Nelson)

The employer says this position is in fact that of "chief engineer," excluded at the time as being managerial.

2. Assistant Manager, On Air (O. Eichel)

Contrary to the position of assistant manager engineering, which the employer equates to the now defunct position of chief engineer, deemed managerial in February 1979, CKVU equates this one to the then supervisory position of area supervisor.

3. Chief or Senior Accountant (C. Richards)

This one existed in 1979, when it was excluded under the heading of managerial functions as opposed to supervisory.

4. Promotions Manager (B. Millar)

This would be the "commercial promotions manager" that existed in 1979 and which was excluded as managerial.

5. Traffic Manager (P. Paul)

This position, according to management, is managerial and was expressly excluded. For the union, it is supervisory in nature.

6. Design Director (E.T. Knight)

The incumbent is in charge of the carpentry and art department. According to management, he is to be considered a non-employee, whereas the union says he is a supervisor.

As the Board said in Bank of Nova Scotia, supra:

"The basis of the exclusion of certain 'management' persons from the coverage of collective bargaining is the avoidance of conflicts of interest for those persons between loyalties with the employer and the union. This

avoidance of conflicts protects both the interests of the employer and the union. The conflict is pronounced when one person has authority over the employment conditions of fellow employees. It is most pronounced when the authority extends to the continuance of the employment relationship and related matters (e.g. the authority to dismiss or discipline fellow employees). It is for this reason that certain persons are denied collective bargaining rights granted to other employees. The Code is clear the mere supervision of fellow employees does not satisfy the rationale for exclusion from employee status under Part V (see section 125(4)). (See also Vancouver Wharves Ltd. (1974), 5 di 30; [1975] 1 Canadian LRBR 162, and Empire Stevedoring Company Limited (1974), 6 di 25; 74 CLLC 16,123, appeal denied [1974] 2 F.C. 742; (1974), 75 CLLC 14,262 (F.C.C. appl. Div.).) ..."

(pages 457-458; 134; and 536)

In many instances, the Board was asked to find the line of demarcation between management and supervision. That is often the case when we have to define the scope of a bargaining unit. (See Greyhound Lines of Canada Ltd. (1974), 4 di 22; and 74 CLLC 16,112 (CLRBR no. 9); Northern Electric Company Limited (1976), 16 di 237 (CLRBR no. 63); British Columbia Telephone Company (1976), 20 di 239; [1976] 1 Can LRBR 273; and 76 CLLC 16,015 (CLRBR no. 58); Cominco Ltd. (1980), 40 di 75; [1980] 3 Can LRBR 105; and 80 CLLC 16,045 (CLRBR no. 240); and Voyageur Colonial Limited (1986), 64 di 167 (CLRBR no. 563).)

It was argued that Mr. Nelson's position is the equivalent of the position Mr. Kennard, a professional engineer, held at the time. A look at Mr. Kennard's position back in 1979 shows he supervised the maintenance crews and came under the authority of a technical services manager. In fact, he testified that his official position was that of maintenance supervisor. We do not find that Mr. Nelson's actual responsibilities disqualify him as an employee, albeit employed in a supervisory position. Of course,

there may be situations where he is in charge, in the sense that he directs a team. But we do not find that in actual terms he is a manager. He does the scheduling, orders parts, assists in budgeting and oversees seven technicians, all belonging to the unit. Mr. Nelson's responsibilities are closer to that of unionized lead-hand Don Preston than to that of now manager Kennard. For instance, there was a time when Mr. Preston screened applications and took part in interviews of applicants. Such is the case of Oliver Eichel who reports to Ken Cathro. He is not a manager. He does some scheduling and oversees a team of master control operation technicians, tape operators, editors, etc., quite like Mr. Nelson does. He is at the first level of supervision but is not a manager. Mr. Cathro keeps a very close look on his staff; to quote Mr. Keenard, Mr. Cathro "actively supervises" his department and closely monitors its activities. He is the one who makes the recommendations for promotions. Some of Mr. Eichel's responsibilities are similar to those of the senior E.N.G. editors who sometimes work as lead-hands. Mr. Eichel does not attend the junior management meetings; Mr. Cathro does.

The Board heard the former promotions manager. Obviously, Ms. Nuyten felt very strongly about her position and its responsibilities. She provided us with a well-prepared brief illustrating her different functions. The promotions manager, once known as the production manager, oversees the work of three unionized employees and one contract employee. As the director of programming, Doug Hoover testifies that Barry Millar's responsibilities require that he "supervise" his staff. He used to be assistant producer and is now in charge of assigning work, preparing budget recommendations, and so on. He is not

involved in negotiations, grievances, etc. Mr. Millar is not a manager. He can only be excluded from the bargaining unit as a supervisor.

The real level of the senior accountant, Ms. Richards, is similar to that of the three gentlemen we have just discussed. It has to do with overseeing the day-to-day operations of a department. Even though it was first suggested by Mr. Reitmeyer, the controller, that Ms. Richards had authority over the employment of fellow employees, upon a closer look at her actual job description we find she has no authority over hiring, firing, leaves of absence, etc. Ms. Richards is not a manager, but a supervisor.

The same goes for the traffic manager, P. Paul, and the design director, E.T. Knight. The latter has responsibilities akin to that of Don Nelson and Ken Cathro. In the case of the traffic manager, we cannot see how we could find that she is a manager, as counsel for CKVU suggests. She is not.

Today more than before, it is not sufficient to rely on job titles alone to justify exclusions. For CKVU to argue res judicata, as it does in the case of the design director just to mention one, is, in this case at least, a form of admission that no convincing evidence establishes that contention.

In summary, we find that not one of the positions excluded, allegedly on the grounds of management duties, are actually managerial. In fact, we find they are employee positions but actually excluded from the certification because of their supervisory functions.

Their incumbents have the right to be unionized under the Code.

C) Alleged Supervisory Positions

The next series of positions in dispute are characterized by management as being held by supervisors or their equivalent. In this case, it is no longer argued that these positions are held by non-employees, but rather that it was not appropriate in 1979 to include them in a single unit with the others. Again, we have to assume that these exclusions were negotiated in good faith and were aimed at people who indeed were supervisors or had "the authority to recommend hiring and/or firing of staff" (supra, February 1, 1979 agreement).

Some 11 positions come under this category. We leave aside for now the accounting department.

1. Scheduling Clerk (ARCA supervisor studio)
(D. Marr)
2. Technical Directors (2)
(G. Marling & G. Poole)
3. Assignment Editor and Business Manager
(D. MacLachlan)
4. Assignment Editor
(T. Morris, Acting)
5. Studio Directors (4)
(D. Stewart, T. Brady, P. Mills and J. Michel)
6. Managing Editors - News
(S. Wyatt)
7. Producers (5)
(D. Budge, A. Boa, S. Jasper, A. Girney and J. Akasuki)
8. Program Assistant (Promotions Department)
(J. Talbot)
9. Senior Writer/Producer (Commercial)
(C. Zygmunt)

10. Writer Producer (Commercial)
(D. Adams)

After having reviewed all material on file, we find first that these positions are all occupied by employees under the Code; second, the position of scheduling clerk (D. Marr) does not qualify as an exclusion under this heading and is covered by the existing bargaining certificate. With this exception, either because on balance they are indeed supervisors or because they share sufficient interests with supervisory positions to belong to the same category, we find that the other nine positions listed under this heading are indeed all excluded from the existing unit and not covered by its intended scope.

D) The Accounting Department

It was suggested by management that the accounting department was, as a whole, intended to be excluded from the initial certification for lack of community of interest. It was further argued, in the case of Teresa Banks, the accounting clerk, also described as the traffic coordinator, that she was excluded as a casual employee.

The positions to consider under this heading are the following.

1. Payroll Clerk (D. Cramer)

The employer says that this is in fact a managerial position excluded under the title of payroll accountant. It is also argued that the position could be confidential.

2. Payroll Clerk Assistant (H. de Haan)

This is a fairly new position described by management as an expansion of the preceding one. A simple clerical position argues the union.

3. Senior Accountant (C. Richards)

The employer says this position is in fact that of chief accountant, expressly excluded as managerial. The union denies that and says Mr. Reitmeyer, the controller, is in charge.

4. Accounting Clerks (2)
(D. Svoboda, receivables, and T. Van der Graaf, payables)

The employer says that these positions have always been excluded. In the case of T. Van der Graaf, he argues history; D. Svoboda's excluded position of "Credit Manager" would have been renamed and at any rate res judicata would apply.

While we were considering the accounting department during the course of the hearing, Mr. Reitmeyer described Ms. Teresa Banks' position of accounting clerk or traffic coordinator as part-time, two days a week on a regular basis. In that sense, we do not see how it could be argued that Ms. Bank's position is currently excluded, as being casual part-time. A casual position is precarious by definition not regular. This being said, the organizational chart produced in the initial certification file (under the signature of Mr. Barry Duggan, who is still the employer's general manager) clearly establishes that accounting clerks were included in the unit. Given this uncontradicted evidence and the fact that on the whole Mr. Cramer (payroll clerk or administrator), Ms. de Haan, his assistant, as well as Ms. Van der Graaf (payables), Ms. Svoboda (receivables) and Ms. Banks (traffic coordinator or clerk) all basically occupy clerical positions, we find that all these positions are indeed covered by NABET's current certification.

As Ms. Richards' responsibilities are somewhat parallel to those of Phillis Paul, the traffic manager, we find

Ms. Richards' position as chief accountant is excluded as being supervisory but not managerial.

E) Miscellaneous Positions

A few other positions are in dispute. First, there is Ted Friend, the house announcer, who comes under the authority of Barry Millar, the promotion manager. The hosts of different programs are also being sought for inclusion as are two make-up artists. We also list under this heading sports director Paul Carlson.

1. Announcer (E. Friend)

Mr. Friend has testified before us and reviewed his career at CKVU, where he started to work in 1985. CKVU argues he is excluded from the certification as a "contract employee." Mr. Friend is in his fifth year at CKVU where he has been working under one-year contracts since he joined. He described CKVU as one of his clients; he is paid in the form of a fee and is entitled to claim income tax expenses. He is incorporated and hired through his company. He produces shows on a freelance basis, such as "Crime Stoppers" and is also the regular station announcer.

He answers to the director of programming, Doug Hoover, whom he describes as his "superior" while Barry Duggan, the executive vice-president and general manager, is in charge of the "Crime Stoppers" account.

Mr. Friend is on CKVU's payroll and has been covered since his very first contract by the company's benefit plans: medical, dental, long-term disability, etc. He collects vacation pay and is entitled to statutory holidays. He is issued a T-4 Form.

2. Make-up Artists (2) (S. Dennis and K. Meyer)

While Mr. Meyer works on call on an irregular basis or as a replacement for Ms. Dennis, the latter is on the company's payroll. CKVU claims both should be excluded as contract employees.

Mr. Meyer, like others who work irregularly, bills the station for his work and is paid a flat rate. Ms. Dennis has no written contract and is on the payroll and has deductions made. Even though she has no direct supervisor, she works under the authority of Mr. Reitmeyer five days a week. A few years ago she asked to have deductions made from her salary. It is now done.

3. Hosts (4)

Those who were there at the time of filing have all left the station. They work on a short term basis, for a fee. The employer argues they are contract employees not covered by the certificate.

The simple facts recounted above show that Mr. Friend and Ms. Dennis are indeed employees of CKVU (see Canadian Broadcasting Corporation (1982), 44 di 19; and 1 CLRBR (NS) 129 (CLRBR no. 383), upheld by the Federal Court of Appeal in Claude Latrémouille v. Canada Labour Relations Board, file no. A-445-82, January 22, 1985). It may be that they are hired in a special fashion, but they remain employees under the Code, employees covered by the existing bargaining unit. The other hosts are not, or at least the file does not allow such a determination. It is pointless to wonder under what conditions they could be added to the unit, since their employee status is not established.

4. Sports Director

Given Mr. Carson's hybrid functions, the Board finds he belongs with the other directors in the supervisory group.

F) Summary

Without repeating ourselves, our review of the facts in relation to the current certification has enabled us to make the following determinations.

- Three positions (filled by three employees) were in fact excluded by management as being confidential while they are not.

- Eight other positions (filled by as many employees) are currently excluded wrongly, in the sense that they do not qualify under any of the exclusions flowing from the existing certificate.
- Seventeen positions occupied by 24 employees, whether qualified as managerial or supervisory, were actually rightly excluded by management, in that they do not fall under the scope of the current certification.
- Five positions (make-up artist Meyer and four hosts) are also rightly excluded, in the sense that no evidence shows that they come under the current bargaining unit.

This raises two questions: one has to do with the positions covered under the existing certificate and the other with the application to amend the certificate so as to extend it to supervisory personnel.

V

The Employee Positions Covered

Ever since Teleglobe Canada, supra, the Board said that distinctions needed to be made between section 18 applications where the additions sought were in fact covered by the intended scope of the original certificate and those where these additions were considered to depart radically from the existing unit. The former are considered more or less like applications for interpretation, while the latter are equated to independent applications for certification governed by

rules applicable to certification, one of which is the requirement of majority union support in the group sought for addition (i.e. certification).

Let us return to Teleqlobe Canada, supra:

"ii) The Board will receive at any time an application from one of the parties for review which on its face would radically affect the nature and scope of the bargaining certificate. But the following conditions must then be fulfilled by the applicant:

a) It must be ready, either by showing membership cards or through a Board ordered vote pursuant to Section 127(1), which reads as follows:

'127.(1) The Board may, in any case, for the purpose of satisfying itself as to whether employees in a unit wish to have a particular trade union represent them as their bargaining agent, order that a representation vote be taken among the employees in the unit.'

or by virtue of a union membership clause in the collective agreement, to prove that it has the support of a majority of the employees to be added to the unit as well as an overall majority in the proposed new unit.

...

d) If the Board's verification reveals that the applicant does not represent a majority among the group of employees to be added, the applicant will maintain its existing certificate

...

...

iv) If it is a matter of an application for review which does not affect the original intended scope of the unit and as a result the nature of the existing bargaining unit, the applicant may apply at any time. The applicant would only have to show the Board, by exhibiting valid membership cards or by a Board ordered vote under Section 127(1) or by way of a union membership clause in the collective agreement, that it has overall majority support in the groups to be joined, since, in reality, it is one homogeneous group. The Board, except in exceptional cases, will not take into account the wishes of the employees in the group to be added. ..."

(pages 333-335; 140-141; and 14,266-14,267)

Applying these rules to the case at bar it is clear that with respect to the supervisory group, the Board must apply to NABET the rules of certification (section 24 et seq.). Here NABET cannot show a single card and consequently cannot claim any support. There is no need for us to determine in the abstract whether this supervisory group could constitute an appropriate bargaining unit on its own or should be merged with the existing one. Regardless of that finding, we still could not certify NABET for lack of sufficient support:

"28. Where the Board

...

(c) is satisfied that, as of the date of the filing of the application or of such other date as the Board considers appropriate, a majority of the employees in the unit wish to have the trade union represent them as their bargaining agent,

the Board shall, subject to this Part, certify the trade union making the application as the bargaining agent for the bargaining unit."

Further, NABET suggested we order a vote. We do not see on what basis we could order a vote in the case of a new certification where the applicant could not at least show the minimal support required under section 29(2) of the Code:

"29.(2) Where a trade union applies for certification as the bargaining agent for a unit in respect of which no other trade union is the bargaining agent, and the Board is satisfied that not less than thirty-five per cent and not more than fifty per cent of the employees in the unit are members of the trade union, the Board shall order that a representation vote be taken among the employees in the unit."

(emphasis added)

The Board has long said it will not order votes where the applicant does not show proper support. Such is the case here, and no vote is justified.

If these employees want a union, someone will have to sign them up and collect the proper dues pursuant to section 27(2) of the Board's Regulations.

Let us turn to the individuals to be added on the ground that their position has always been covered. If we apply the rule set out in Teleglob Canada, supra, whereby NABET has to show "overall support in the groups to be joined" (Teleglob Canada, supra, pages 335; 141; and 14,267).

A confidential report on NABET's support was prepared by the Board's investigation officer as of the date of filing of this application. At the time, the unit comprised 165 employees. With the 11 positions and their incumbents, it adds up to 178. Our files show that after such addition, NABET still has a comfortable majority in the overall unit. This is precisely the conclusion the intervening employees argue we cannot draw because of the Charter of Rights. Let us consider their arguments.

VI

The Intervenors' Arguments

We characterize as Charter argument jurisdictional issues raised on behalf of the employees occupying positions that come under NABET's existing certification, but who were not so considered or so treated in reality.

Basically, the intervenors object to adding certain employees to the existing bargaining unit through the use of the Board's review power (section 18). The two issues that arise from this objection are as follows.

- A. Does the addition of these employees without inquiring as to their thoughts on the matter violate the guarantee of "freedom of association" found at section 2(d) of the Charter?
- B. Can the Board use its review power to add employees to a bargaining unit without going through the normal certification procedure?

Let us now turn to the first one.

- A. Does the addition of these employees without inquiring as to their thoughts on the matter violate the guarantee of "freedom of association" found at section 2(d) of the Charter?

As far as the Board is concerned, there is an easy answer to the Charter argument raised by the intervenors. Until very recently, there was still a debate in Canada whether section 2(d) of the Charter applies to collective bargaining. It appeared from the first cases considered by the Supreme Court of Canada that those in favour of applying section 2(d) to collective bargaining had an uphill battle. The trilogy of Supreme Court of Canada cases in this regard are: Reference re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313; PSAC v. Canada, [1987] 1 S.C.R. 424; and RWDSV v. Saskatchewan, [1987] 1 S.C.R. 460.

In The Professional Institute of the Public Service of Canada v. The Commissioner of the Northwest Territories and The Northwest Territories Public Service Association, no. 21230, August 16, 1990 (S.C.C.), the majority of the Supreme Court has again reiterated that freedom of association does not encompass the right to bargain one's working conditions. For example, Sopinka, J. wrote the following in his decision:

"The above propositions concerning s. 2(d) of the Charter lead to the conclusion, in my opinion, that collective bargaining is not an activity that is, without more, protected by the guarantee of freedom of association. Restrictions on the activity of collective bargaining do not normally affect the ability of individuals to form or join unions. Although collective bargaining may be the essential purpose of the formation of trade unions, the argument is no longer open that this alone is a sufficient condition to engage s. 2(d). Finally, bargaining for working conditions is not, of itself, a constitutional freedom of individuals, and it is not an individual legal right in circumstances in which a collective bargaining regime has been implemented... Apart from the reasons given in the Alberta Reference, the conclusion that collective bargaining does not fall within s. 2(d) accords with the results in the s. 2(d) trilogy of cases. In those cases, this Court upheld not merely restrictions on the right to strike, but also the imposition of binding arbitration without negotiation, and the imposition of terms of employment without negotiation. It is difficult, therefore, to conceive of a principle that could bring other aspects of the collective bargaining relationship within the purview of s. 2(d), and yet not overrule the trilogy."

(pages 13-14)

In concurring reasons, Dickson, C.J. concluded:

"Reluctantly, I find that I am unable to agree with Cory J.'s assertion that once a legislature has chosen to establish a public sector collective bargaining scheme that it may not place arbitrary restrictions upon the choice of association with which it will engage in collective bargaining. If, as Cory J. concedes, the government of the Northwest Territories was under no duty to enact a scheme of collective bargaining, then in my view it logically follows that limitations placed upon a purely statutory

entitlement do not attract the protection of s. 2(d) of the Charter. If s. 2(d) does not guarantee the right to bargain collectively, I fail to understand how it can guarantee a right to any particular bargaining agent. To find otherwise in effect would constitutionalise collective bargaining rights, a proposition which was rejected by a majority of this Court..."

(page 3)

L'Heureux-Dubé, J. also in concurring reasons, added the following:

"While s. 42(1)(b) of the Act may affect the ability of an association to gain recognition and therefore to bargain on behalf of employees it does not fetter the activity recognized and protected by the Charter, the associational activity of one person with another. My colleague Cory J. states on p. 10 of his reasons that '[t]he needs of the employees are only known by them, and they should have the right to choose the association which can best represent their needs.' They have. The legislation perhaps does not represent the best balance of the interests involved, but as it strikes at no activity protected by the Charter, the legislative choice in this regard must remain intact."

(page 5)

We are equally bound by earlier decisions of the Federal Court of Appeal which arrived at the very same conclusion. In Nova Scotia Nurses Union, DEVCO Local v. Cape Breton Development Corporation (1989), 98 N.R. 119, Mr. Justice MacGuigan stated the following about section 2(d) and the right to bargain collectively:

"However, the issue has already been decided in this Court in Public Service Alliance of Canada v. The Queen, [1984] 2 F.C. 889; 55 N.R. 285; ..., the case from which the appeal was taken to the Supreme Court in its second decision above. In that case Mahoney J.A. said (at p. 895 F.C., p. 289 N.R.):

'I do not think it desirable to attempt to catalogue the rights and immunities inherent in a trade union's guaranteed freedom of association.

Clearly, collective bargaining is, or should be the primary means by which organized labour expects to attain its principal object: the economic betterment of its membership. However fundamental, it remains a means and, as such, the right to bargain collectively is not guaranteed by paragraph 2(d) of the Charter ...'

Marceau, J.A., in his concurring reasons took the same point of view. Since the appeal from this court was dismissed by the Supreme Court, with three of the six judges taking the same view of the law as this court, I believe I continue to be bound by this court's decision. The applicant's argument on this question must therefore fail, since any right to belong to specific bargaining units is dependent upon the status of the right to collective bargaining itself."

(page 124)

The Federal Court of Appeal feels bound by its previous decision. We are also bound by the Federal Court of Appeals's interpretation of the Charter.

The intervenors somewhat tried to distinguish the above on the basis that they want to protect their right not to associate. The Supreme Court's most recent ruling indirectly determines that there is no such negative freedom of non-association insofar as negotiations are concerned. In our view, as long as one tries to apply section 2(d) of the Charter to collective bargaining, both the right to associate and the right not to associate will not be violated. The essential point in each argument concerns whether the Charter protection applies to collective bargaining. Since it does not, then there can be no violation.

Counsel for the intervening employees alleged that the Charter protects the employees' rights not to join the

union in this case. He states at page 3 of his written argument (submitted at the hearing):

"It is clear that employees are free under our laws to bargain individually with their employer. It follows from this definition that freedom of association must be wide enough to guarantee the right to associate to bargain collectively. If that analysis is accepted, the negative right, ie, the freedom not to be associated with a group for the purposes of collective bargaining, must be equally protected."

In the view of the intervenors, the Board would violate the Charter were it to include them in a unit with other employees they did not want to associate with. The Federal Court of Appeal rejected this same argument in Nova Scotia Nurses Union, DEVCO Local, supra.

The Ontario Court of Appeal noted in Ontario Public Service Employees Union v. Lavigne (1989), 89 CLLC 14,011, that the Charter, even if applied to collective bargaining issues, was not intended to give each individual employee the right to do as he pleased. The Court stated:

"... we cannot find that the scope of ss. 2(d) is such as to compel the court to conclude that the drafters of the Charter intended, by the guarantee of the fundamental freedom of association, to render these historical collective bargaining practices and procedures and traditional trade union activities in violation of the Charter."

(page 12,083)

The advent of the Charter and the inclusion of the right of freedom of association were not intended to render obsolete traditional majority rule concepts found in our Code.

Relying on one's past decisions as authority to make a determination has often been viewed as a lack of good taste if not of good judgment. Still, if only for the sake of consistency, we will reiterate what was said in Canada Post Corporation et al. (1989), 4 CLRB (2d) 291; and 89 CLC 16,020 (CLRB no. 738).

In that case, employees who were covered by a certification, while not being members of the certified union, filed a complaint pursuant to section 94(3)(a)(vi) against their employer, Canada Post, alleging discrimination. During a national lawful strike ordered by the Canadian Union of Postal Workers (CUPW), Canada Post decided to lock out all employees at its Vancouver plant and to hire replacement workers. Mr. Thys, a complainant, had given advance notice that he would not strike and was available to work. Canada Post, regardless of this employee's desire to work, locked him out for strategy reasons. Thys alleged he was forced to take part in a strike and illegally penalized by management. One of his arguments before the Board was his so-called negative right under section 2(d) of the Charter, his alleged right not to associate. The Board dismissed this argument as follows:

"The negative rights of 'Rand Formula employees' which section 94(3)(a)(vi) would fail to protect are the right not to participate in a strike and hence the right to work during a strike. By not providing any remedy for the violation of these rights, section 94(3)(a)(vi) would in effect be forcing the complainants to participate in a strike and, consequently, to associate with a union, contrary to their freedom not to associate which is guaranteed by section 2(d) of the Charter.

The complainants based their entire argument on the Ontario High Court's judgment in Re Lavigne and Ontario Public Service Employees Union et al. (1986), 55 O.R. (2d) 449 (H.C.J.). ...

...

... Since the instant case has been argued before us, the Ontario High Court's decision in Re Lavigne, supra, has been quashed by the Supreme Court of Ontario (Court of Appeal) which granted the appeal of OPSEU in a detailed judgment released on January 30, 1989 (Ontario Public Service Employees Union v. Lavigne (1989), 89 CLC 14,011 (Ont. C.A.)). Application for leave to appeal to the Supreme Court of Canada has since been filed by Mr. Lavigne on February 28, 1989 (Court file no. 21378) and is still pending.

In its judgment, the Court of Appeal analyzes the Supreme Court of Canada's 'Trilogy' concerning freedom of association (Re Public Service Employee Relations Act et al., [1987] 1 S.C.R. 313 (the Alberta Reference); Public Service Alliance of Canada et al. v. Her Majesty The Queen in right of Canada et al., [1987] 1 S.C.R. 424; and The Government of Saskatchewan et al. v. The Retail, Wholesale and Department Store Union, Locals 544, 496, 635 and 955, et al., [1987] 1 S.C.R. 460). Relying on general observations made by Ledain J., McIntyre J. and Dickson C.J.C. in the Alberta Reference, the Court of Appeal concludes that freedom of association is viewed by the Supreme Court as:

'... a right which inheres in the individual, but which can only be exercised jointly by a plurality of individuals carrying out associational activities in common cause for a common purpose.'

(page 12,079; emphasis added)

Viewing freedom of association in terms of a positive right, the Court then concludes that the Rand Formula provision does not infringe that right:

'... The positive freedom of association safeguards the right of individuals to associate with each other for the purpose of protecting common interests and pursuing common goals. The agency shop or Rand formula provision does not limit or interfere with that right. It imposes no restriction on an employee's ability in voluntary association with others to achieve a common purpose or advance a common cause; the employee remains patently free to oppose the union and the causes which it may support, to seek to have the union's bargaining rights terminated, and to join with others for such purposes.'

(page 12,080; emphasis added)

Assuming, without deciding the point, that negative freedom of association is constitutionally protected by section 2(d) of the Charter, the Court finds no violation of Lavigne's freedom not to associate:

'... On that assumption, we are nonetheless of the opinion that the simple requirement of a monetary payment to OPSEU is not violative of

his freedom not to associate. The compelled payment does not curtail or interfere with any aspect of Lavigne's freedom of non-association or the interests protected thereby. His right not to associate remains unimpaired. He is not forced to join the union; he is not forced to participate in its activities; and he is not forced to join with others to achieve its aims. The compelled payment does not identify him personally with any of the political, social or ideological objectives which OPSEU may support financially or otherwise; nor does it impose any obligation on him to adapt or conform to the views advocated by the union.

(page 12,082; emphasis added)

We tend to favour the view that section 2(d) of the Charter does not encompass a negative freedom of association, since such a protection would not serve the collective purpose of that section as defined by the Supreme Court of Canada in the 'Trilogy.' The least we can say is that the protection of the right not to associate is not readily compatible with the essence of freedom of association which would require the combination of individuals.

The Board is ready nevertheless to assume, as the Court of Appeal did in Ontario Public Service Employees Union. v. Lavigne, supra, that the negative freedom of association is guaranteed by section 2(d) of the Charter. ..."

(pages 307-309; and 14,215-14,216)

We are still of the same view and do not consider that the addition of one's position to a bargaining unit violates one's freedom of association.

B. Can the Board use its review power to add employees to a bargaining unit without going through the normal certification procedure?

The fact that the Charter argument does not apply brings us to consider the Board's existing jurisprudence under section 18.

In Canada Ports Corporation (1985), 54 di 246 (CLRB no. 507), the Board reviewed the two possible scenarios in this type of section 18 review application. In one case,

the wishes of employees are relevant. For the second type of case, however, the wishes of the employees simply have no bearing on the matter. The Board stated as follows:

"The incumbents of the positions affected by the present application were opposed to it. It therefore becomes important to ascertain the framework and the intended scope of the original certification. On that basis, we should thereafter determine the necessity of whether or not to obtain the majority of the incumbents' consent prior to adding them to the unit."

Applying the principles enunciated in Telegraph Canada, supra, the Board elaborated on them in 1979 in British Columbia Telephone Company (1979), 38 di 14; and [1979] 3 Can LRBR 350 (CLRBR no. 206), (at pages 78ff; and at pages 398ff) by making a distinction between applications for review which raised a problem of representativity and those which raised the problem of interpreting the intentional scope of a certification. We stated that in the first instance the wishes of the employees were pertinent whereas it could be of no import in the second instance."

(pages 268-269)

Similarly, in Canadian Broadcasting Corporation, supra, the Board reiterated the above as follows:

"... If the Board rules that it is appropriate to include a given function in an existing group and the bargaining agent has already been shown to be representative, there's no need to review the status of the certified union. ..."

(pages 166-167; and 286)

Another important decision in this regard is Canadian Pacific Limited (1984), 57 di 112; 8 CLRBR (NS) 378; and 84 CLLC 16,060 (CLRBR no. 482). Once again in this decision, the Board reviewed whether the wishes of the employees sought had to be canvassed. The Board considered the analysis required for this type of case and stated:

"... The purpose of the analysis would be to establish whether the proposed changes constituted a radical alteration in the nature

and scope of the bargaining certificate. If that was so, then the Board would seek proof of a majority support, not only amongst the employees to be added, but also in the overall proposed new unit. In the event that the Board is satisfied that the changes do not affect the essential or fundamental nature nor the object of the original certification order, then the Board will not canvas the wishes of the employees sought to be represented."

(pages 123-124; 389-390; and 14,498)

Another interesting point from this case is that the applicant invoked section 2(d) of the Charter and argued that the employees had to be canvassed as to their intent. The Board looked at the case law existing at the time and stated as follows:

"Inasmuch as the CTU argument is based on the Charter, it is based on the assumption that collective bargaining rights are entrenched within the meaning of freedom of association. At this stage, that is a rather dubious assumption. ..."

(pages 127; 393; and 14,501)

The Board then went on to note the Federal Court of Appeal's decision in PSAC v. Canada which we referred to earlier. The Court of Appeal's position, of course, has not changed in this regard.

One final case is Canadian National Railway Company (1984), 56 di 137 (CLRB no. 468), where the Board considered a similar question. The Board stated as follows:

"... it would be unrealistic to conduct a representation vote in these circumstances. Even if all of CACAW's members voted negatively, that would not upset the majority character of the CSCU's support. This is further supported by the responses to the Board's postings of notices of the applications across the CN system. None of the employees represented by the CSCU filed representations objecting to the continuation of that representation or the

inclusion of the radio technicians in their bargaining unit. ..."

(page 148)

While this case dealt with the intermingling of employees represented by two separate unions, it is nonetheless similar to the instant case in that a negative vote by all objecting employees would still have no effect on the union's representative character.

We have also reviewed the decisions of the Federal Court of Appeal in this area.

The first Federal Court of Appeal judgment concerns Teleglobe Canada. In that judgment, Mr. Justice Pratte writing for the Court stated as follows:

"Applicants have presented only one argument, namely that under s 126 of the Canada Labour Code the Board, before adding new employees to the bargaining unit represented by the mis-en-cause union, should have ascertained that a majority of those employees actually wanted this union.

This argument does not bear scrutiny. What s 126 provides is simply that a union should not be certified for a bargaining unit unless a majority of the employees in that unit so desire. There was no breach of s 126 here, because the Board took care to ascertain that the union in question was supported by a majority of the members of the bargaining unit which the Board determined was appropriate."

(Henri Proulx et al. v. Canada Labour Relations Board, file no. A-514-79, October 3, 1980 (F.C.A.), page 2)

In a second judgment concerning Teleglobe Canada rendered at the same time by the Federal Court of Appeal, Mr. Justice Pratte held that our section 119 powers in this area were quite extensive. He did state, however, the following:

"It is true that the Board should not use s 119 to get around the requirements of ss 124 et seq; but that is not a reproach which may be levelled against the Board in the case at bar, since it is clear that it took care, before amending the description of the bargaining unit, to ascertain the representative nature of respondent unit within the new bargaining unit."

(Tele globe Canada v. Canadian Overseas Telecommunications Union, judgment rendered from the bench, file no. A-487-79, October 3, 1980 (F.C.A.), page 2)

The third Federal Court of Appeal judgment on the issue is Claude Latrémouille v. Canada Labour Relations Board, supra.

In the majority judgment of Mr. Justice Pratte, concurred in by Mr. Justice Hugessen (except on a point essential to this decision), one finds a summary of the applicant's contention:

"The applicants maintained that in the case at bar the Board had in no way ascertained the wishes of the employees in question. In view of its failure to do so, they argued, the Board had no jurisdiction to enlarge the bargaining units and the decision a quo must consequently be quashed."

(page 8)

In his response, Mr. Justice Pratte writes that failing to ascertain union support would still not constitute a reviewable error on our part:

"... Even if, as the applicants maintained, it was true that the Board had to verify the representativeness of the unions before amending their certificates, its failure to do so would not, in my opinion, constitute an excess of jurisdiction. I am of the view that ... the rule set out in paragraph 126(c) is not one which limits the Board's jurisdiction; in my view, it is rather a rule which prescribes how that jurisdiction is to be exercised. I therefore cannot conclude from the mere fact that this rule was infringed that the Board exceeded its jurisdiction. ..."

(page 10)

Mr. Justice Pratte's point of view, therefore, is that even if we were wrong it would not be an excess of jurisdiction.

However, on this point Mr. Justice Hugessen, in a concurring opinion, disagreed with Mr. Justice Pratte. Mr. Justice Hugessen stated:

"There is, however, one point on which I do not share the opinion of Pratte J, but this in no way alters my conclusions: my brother states that the Board's failure to verify the representativeness of the unions as regards the new bargaining units is not an excess of jurisdiction. I am not sure of this and prefer not to give an opinion on this question since I am of the view, in any event, that the Board in fact made sure that the unions were representative and was convinced that the addition of the free lances to the bargaining units could not change this situation. This is, in my view, the only possible interpretation of the passage in the decision where the Board took the trouble to demonstrate that in each new unit the members who had been added were fewer in number than the employees covered by the existing certificates. It is of course not up to us to assess or comment on the process and methods used by the Board to arrive at this conclusion."

(page 2)

This passage explains why we felt it necessary to verify and to mention that, notwithstanding a vote by the intervenors, the bargaining agent would still have a majority.

We accordingly find that the intervenors' second argument is ill founded and dismiss it.

VII

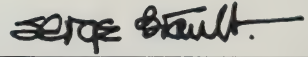
Conclusion

For all the reasons stated above, the Board finds that the following positions are covered by NABET's certification.

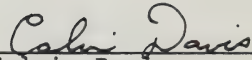
1. Scheduling Clerk
(D. Marr)
2. Payroll Clerk or Personnel Payroll Administrator
(D. Cramer)
3. Assistant Payroll Clerk
(H. de Haan)
4. Accounting Clerk, receivables
(D. Svoboda)
5. Accounting Clerk, payables
(P. Van der Graaf)
6. Accounting Clerk (Traffic Coordinator)
(T. Banks)
7. Announcer
(E. Friend)
8. Make-up Artist
(S. Dennis)
9. Secretary, Operations and Engineering
(G. Paielement)
10. Secretary, Sales
(A. Hansen)
11. Administrative Assistant, News
(K. Shimbashi)

The Board has already stated in Teleqlobe Canada, supra, that in such cases these positions would fall under the parties' collective agreements. This being so, we nevertheless find it appropriate to suspend the implementation of this decision until October 9, 1990, to enable the parties to take the appropriate steps to allow this decision to come into force without causing any major disruptions.

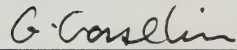
For the rest, NABET's application is dismissed.



Serge Brault
Vice-Chairman



Calvin Davis
Member of the Board



Ginette Gosselin
Member of the Board

ISSUED at Ottawa, this 11th day of September 1990.

CLRB/CCRT - 821

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Summary

CANADIAN BROTHERHOOD OF RAILWAY,
TRANSPORT AND GENERAL WORKERS,
APPLICANT AND MARINE ATLANTIC INC.,
EMPLOYER AND MESSRS. RICHARD EDWARD
DICKIE, NORMAN DAVID BUDD, ROBERT
WALTER DICKIE AND GERALD S. MYERS,
INTERVENORS.

Board Files: 530-1762
530-1763

Decision No.: 822

These two applications for review
of bargaining certificates stem from
a major realignment of bargaining
units at Marine Atlantic Inc. in the
Maritimes.

The realignment sought for by the
employer and agreed to in part by
the Board under the provisions of
Section 18 of the Code left a few
incumbents of some classifications
formerly excluded in some bargaining
units but not so in others. The
union asked that they be included.

The Board reviews its policy
concerning review applications to
include classifications into
bargaining units or to exclude them.

It also comments upon its developing
policy concerning applications by
employers under Section 18 to
realign bargaining unit structures.

Résumé de Décision

FRATERNITE CANADIENNE DES CHEMINOTS,
EMPLOYES DES TRANSPORTS ET AUTRES
OUVRIERS, DEMANDEUR ET MARINE
ATLANTIC INC., EMPLOYEUR ET
MESSIEURS RICHARD EDWARD DICKIE,
NORMAND DAVID BUDD, ROBERT WALTER
DICKIE ET GERALD S. MYERS,
INTERVENANTS.

Dossiers du Conseil: 530-1762
530-1763

Décision n°: 822

Ces deux requêtes en révision de
certificats de négociation
collective découlent d'une
restructuration majeure des unités
de négociation chez Marine Atlantic
Inc. dans les Maritimes.

Par suite de la restructuration
demandée par l'employeur et acceptée
en partie par le Conseil, en vertu
de l'article 18 du Code, quelques
titulaires de classifications
auparavant exclues étaient inclus
dans certaines unités de négociation
mais pas dans d'autres. Le syndicat
a demandé qu'ils soient inclus.

Le Conseil rappelle sa politique
concernant des requêtes en révision
visant à inclure des classifications
dans une unité de négociation ou de
les en exclure.

Il commente également sa politique
relative aux demandes présentées par
les employeurs aux termes de
l'article 18 du Code afin d'obtenir
la restructuration d'unités de
négociation.



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Reasons for decision

Canadian Brotherhood of
Railway, Transport and
General Workers,

applicant,

and

Marine Atlantic Inc,

employer,

and

Mr. Richard Edward Dickie,
Mr. Norman David Budd,
Mr. Robert Walter Dickie,
Mr. Gerald S. Myers,

intervenors.

Board Files: 530-1762
530-1763

I

The Board consisted of Mr. James Abson and Mr. Robert
Cadieux, Members and of Mr. Marc Lapointe, Q.C.

These constitute the reasons for decision of the Board in these two files which have been joined by the panel of the Board for decision purposes.

The reasons for this decision were written by Chairman Marc Lapointe.

Appearances:

Mr. Theo N. Stol, for the applicant; and
Mr. Robert Monette, for the employer.

The Canadian Brotherhood of Railway, Transport and General Workers (hereinafter CBRT and GW) filed on September 5, 1989, an application for review pursuant to Section 18 of the Canada Labour Code (Part I - Industrial Relations) asking the Board to amend two certification orders it holds: one covering licensed personnel of Marine Atlantic Inc. (hereinafter Marine Atlantic) and the other, covering unlicensed personnel of the employer, by including in the former of these two units one (1) senior purser, one (1) shore purser, four (4) chief stewards, six (6) pursers, and two (2) assistant pursers, and by including in the latter bargaining unit, two (2) chief cooks. All of these positions were heretofore excluded by some former bargaining unit descriptions.

The Board gave two (2) file numbers to this application since the proposed changes would be affecting two (2) bargaining units.

Marine Atlantic met the application by a plea to have the application dismissed outright as lacking an essential

element, the minimum support among the personnel it seeks to add to the existing units.

To quote from this plea dated September 18, 1989:

"The lack of this essential element to the present application should result in its immediate dismissal and we respectfully ask the Board to so order.

Unless the Board dismisses the application immediately, we would ask a hearing in order to present evidence and representations in support of our reply and objection."

(emphasis added)

At a later date, namely October 3, 1989, Marine Atlantic reiterated its preliminary objection to the application, thus:

"We are in receipt of a copy of a letter addressed to your attention by Applicant and dated September 27, 1989.

The content of the letter deals with the appropriateness issue as appears to Applicant. In our respectful submission, this is premature.

The point is that the application should not be entertained for lack of an essential pre-condition: evidence of support. The non-scheduled positions sought by Applicant were never covered by the intentional scope of any unit, past or recent, and cannot therefore be simply 'swept in' at the mere request of Applicant.

We urge the Board to dismiss the application immediately.

Yours very truly,

(Signed)

Robert Monette"

Finally, on January 3, 1990, Marine Atlantic concluded a letter to the Board, thus:

"We invite the Board to pronounce on our preliminary objection and to dismiss the current application immediately."

For its part, the Applicant never requested a hearing unless its application was not granted outright and it contested the preliminary objection raised by Marine Atlantic.

In the meantime, the Board was processing this application, including a thorough investigation by one of its investigation officers who produced a lengthy report which was forwarded, as usual, to the parties and to the Board, on January 9, 1990.

Nine of the sixteen incumbents of the positions sought to be included wrote to the Board expressing a wish as to be included or not and qualifying themselves as management employees. Four more asked from the Board the status of intervenors and it was granted to them: they received copies of all the documents on file as well as the report of the investigating officer. They were Richard E. Dickie, Robert W. Dickie, and Gerald S. Myers, all pursers aboard the M.V. Princess of Acadia, and Norman Budd, senior purser aboard the same vessel. Three of the incumbents made no representation to the Board.

II

This application was an aftermath of an application made by Marine Atlantic pursuant to section 18 of the Code in

June of 1988 (Board file 530-1626). Marine Atlantic made representations to the Board alleging that its transformation by the Canadian government from a branch or division of Canadian National into a separate crown corporation had resulted in a chaotic and unmanageable labour relations system with twenty (20) bargaining units represented by nine (9) trade unions or bargaining agents. It was asking the Board to realign its bargaining structures by merging some of these bargaining units. The Board eventually acquiesced to a restructuring reducing eighteen (18) bargaining units to four (4) and eventually certified four (4) bargaining agents, namely:

- 1) CBRT and GW for an onboard vessel unit of unlicensed personnel;
- 2) CBRT and GW for an onboard vessel unit of licensed personnel or officers;
- 3) The Brotherhood of Maintenance of Ways Employees for a shore-based unit of maintenance employees; and
- 4) a council of trade unions, the TCU/ILA Council of Trade Unions for a shore-based unit of terminal and clerical employees.

The instant application for review deals only with units 1) and 2) above.

Prior to the restructuring referred to above, there were six (6) bargaining units instead of the now one unit of onboard vessel unit of licensed personnel or officers (see

unit 2) above). Also prior to said restructuring there were four (4) bargaining units instead of the now one unit of onboard vessel unit of unlicensed personnel (see unit 1 above).

In the course of disposing of the June 1988 application by Marine Atlantic for restructuring the bargaining set-up, the Board was made aware by some bargaining agents of the fact that there were certain named classifications included in some bargaining units while similarly or identically named classifications were excluded from other bargaining units.

The Board took notice of this fact when issuing the four (4) new certification orders while being mindful of a strong objection by Marine Atlantic to the Board acting upon the unions' request to deal immediately with them.

The Board then said in file 530-1626:

"The Board has been mindful in defining the new bargaining certificates that some of the parties had raised some problems created by some alleged or existing incongruities in the descriptions of former bargaining units as they applied to the same classifications of employees pertaining to their belonging to bargaining units or not. ...The parties who wish to have these problems corrected now have a choice of recourses, a straightforward review application, or a review application for reconsideration,..."

The Board may now state that two main considerations governed its decision at the time:

- a) there was a consensus that there was urgency to deal with the realignment of bargaining structures which

could have been impaired by delays if there had been at the same time the necessity to proceed with these incongruities since negotiations for renewal were at hand, and

- b) in vote situations involving vying unions, the policy of the Board has always been to place everybody on an equal footing by restricting the constituency to the existing parameters of bargaining units.

Obviously the CBRT and GW, which won two votes ousting the Seafarers International Union in new bargaining unit 1) above, and Canadian Merchant Service Guild in now bargaining unit 2) above, chose to make a straightforward review application, the instant application.

III

As regards that part of the review application concerning the onboard vessel unit of licensed personnel or officers, the investigation of the Board has revealed the following facts.

1. There was one unit of pursers and chief stewards in the Newfoundland Service (both gulf and coastal) covered by a collective agreement, namely 1.2. There were eighty (80) employees in this unit and they were classified as follows:

Chief steward	15
Assistant chief steward	22
Purser	18
Assistant purser	24
Purser steward	1

2. There were four (4) engineer officer units. One in the Newfoundland Service and covered by a collective agreement, namely 1.3; One in the Yarmouth - Bar Harbour Service (M.V. Bluenose) and covered by a collective agreement, namely 1.5; one in the Prince Edward Island - New Brunswick Service and covered by a collective agreement, namely 1.7 and finally, one in the Digby - Saint John Service (M.V. Princess of Acadia) and covered by a collective agreement, namely 1.9.

Approximately 220 engineers were encompassed by these four (4) bargaining units.

3. There was a unit of deck officers aboard all Marine Atlantic vessels covered by a collective agreement namely 6.1. There were ninety-one (91) employees in that unit and they were classified as follows

Senior Chief officer	2
Chief officer	16
First officer	5
Second officer	46
Third officer	22

Here is the first bone of contention:

There are twelve (12) licensed employees in three (3) classifications currently staffed by Marine Atlantic which are in the same named classifications as some of those listed in 1. above (Newfoundland Service - former collective agreement 1.2) but which always have been excluded from the description of other bargaining units.

They are, four (4) chief stewards: 2 in the Yarmouth - Bar Harbour Service (M.V. Bluenose) and 2 in the P.E.I. - New Brunswick Service (four vessels). They are, six (6) pursers: 2 in the Yarmouth - Bar Harbour Service (M.V. Bluenose) and 4 in the Digby - Saint John Service (M.V. Princess of Acadia). They are, two (2) assistant pursers in the Yarmouth - Bar Harbour Service (M.V. Bluenose).

In a submission of December 20, 1989, prompted by the investigation of the Board, the CBRT and GW specified the licensed positions it wants included in the description of the bargaining unit it is now certified for, in the onboard vessel unit of licensed personnel or officers. They are the incumbents of the twelve positions just identified plus a senior purser in the Digby - Saint John Service and a shore purser in Yarmouth. This accounts for 14 of the contested positions.

As regards that part of the review application concerning the onboard vessel unit of unlicensed personnel, the investigation of the Board has revealed the following facts.

Prior to the restructuring of the bargaining units there were four (4) units of such personnel aboard Marine Atlantic vessels:

1. One unit for that personnel in the Newfoundland Service and covered by collective agreement 1.1 which included among other classifications the following ones:

Senior chief cook	3
Chief cook	6
Senior second cook	5
Second cook	3
Third cook	5

2. One unit in the Yarmouth - Bar Harbour Service covered by collective agreement 1.4 which included among other classifications, the following ones:

Senior second cook	3
Third cook	4

But this unit did not have a classification of senior chief cook.

3. One unit in the Prince Edward Island - New Brunswick Service covered by collective agreement 1.6 which included, among other classifications, the following ones:

Senior chief cook	2 (one on the M.V. Abegweit) and
-------------------	----------------------------------

(one on the M.V. John Hamilton
Gray)

Senior second cook	1
Second cook	1
Third cook	7

For this Service, the latest information gathered by the Board from Marine Atlantic is that there are no chief cook and that whenever a senior chief cook is off sick, away on leave of absence, etc., the senior second cook would be "staffed in" as senior chief cook.

4. The fourth bargaining unit covering the Digby - Saint John Service, did not contain any classification of cooks in the collective agreement 7.1.

Overall there are approximately 1200 unlicensed employees at Marine Atlantic.

Here is the second bone of contention:

In the Yarmouth - Bar Harbour Service the chief cook classification is excluded. There are two incumbents.

The investigation of the Board produced the job descriptions for the senior purser, the shore purser, the chief steward (P.E.I. and Fundy Services, Yarmouth, Nova Scotia (M.V. Bluenose), the chief steward Vessel Services, Borden, P.E.I., the purser, P.E.I. and Fundy Services, Saint John, New Brunswick (M.V. Princess of Acadia) as well

as job descriptions for chief cooks P.E.I. and Fundy Services, Yarmouth, N.S. and some others.

Reference was made above to the operations of the new Marine Atlantic having in the past and for many years been intermingled with the overall operations of Canadian National. What is now Marine Atlantic constituted but a division of CN. Many of the traditions of CN were adopted and followed by the Marine division. CN, which was and is even more today a rail transportation undertaking, applied to the specific operations of its marine division most, if not all, of its labour relations practices and policies, inter alia.

One of those consisted in identifying the two most important categories of its employees as the scheduled employees (those who were covered by collective agreements) and the non-scheduled employees (those who were excluded). This terminology permeated the labour relations at the marine division and still persists today, even after the last restructuring of 1989 by this Board. Why "scheduled" and "unscheduled" in maritime transportation?

The positions excluded from bargaining units are identified as "unscheduled" positions.

Basically, the working conditions and fringe benefits of the scheduled employees were identified and elaborated upon in collective agreements. Not so for the working conditions and benefit packages recognized by the then employer to the non-scheduled employees.

Generally speaking also, the non-scheduled employees enjoyed benefits somewhat superior to those negotiated for by the bargaining agents representing the scheduled employees groups. There is evidence of this situation prevailing at Marine Atlantic in the instant file as contained in the written representations of some of the intervenors who are all non-scheduled employees.

A history of the development of bargaining rights and collective bargaining involving Marine Atlantic and its predecessors as employer of the licensed and unlicensed employees is also very revealing and important.

Eight of the ten bargaining units which existed prior to the restructuring of 1989, had been certified by the predecessor to the present Board. One was the result of a voluntary recognition by the employer and one was the result of certifications issued by the former Board which were changed by this Board. Here is the breakdown.

A. In the case of the four (4) bargaining units of unlicensed personnel.

1. Collective agreement 1.1 (unit of unlicensed personnel aboard all vessels in the Newfoundland Service). Certification issued by former Board on December 16, 1949 to CBRT and GW involving Canadian National Railways Company. (Board file 766:100:49).

2. Collective agreement 1.4 (unit of unlicensed personnel in the Yarmouth - Bar Harbour Service).

Certification issued by former Board on March 22, 1956 to CBRT and GW involving Canadian National Railways Company. (Board file 766:609).

3. Collective agreement 1.6 (unit of unlicensed personnel in the P.E.I. - New Brunswick Service)
Certification issued by former Board on December 28, 1962 to CBRT and GW and involving Canadian National Railways Company. (Board file 766:1352)
4. Collective agreement 7.1 (unit of unlicensed personnel in the Digby - Saint John Service)
Certification issued by former Board on May 13, 1950 to the Seafarers International Union of North America (Canadian District), Saint John Branch (now the Seafarers' International Union) and involving the Canadian Pacific Railway. (Board file 766:135). The vessel then in use on that service was the S.S. Princess Helene. That vessel was replaced in 1963 by the Princess of Acadia and the Canadian National Railways later took over that vessel and that Service from Canadian Pacific. CN Marine Inc. and later Marine Atlantic inherited that situation. But neither the bargaining agent (SIU) nor the employers ever bothered to update that certification. The decision of 1989 by this Board swept aside this series of cobwebs with the creation of the single unit of unlicensed personnel.

B. In the case of the six (6) bargaining units of licensed personnel or officers.

1. Collective agreement 1.3 (unit of engineer officers in the Newfoundland Service). Certification issued by former Board on April 15, 1955 to CBRT and GW involving Canadian National Railway Company (Newfoundland Steamship). (Board file 766:514).
2. Collective agreement 1.5 (unit of engineer officers in the Yarmouth - Bar Harbour Service). Certification issued by former Board on January 22, 1958 to CBRT and GW involving Canadian National Railways Company. (Board file 766:842).
3. Collective agreement 1.7 (unit of engineer officers in the P.E.I. - New Brunswick Service). Certification issued by former Board on February 27, 1958 to CBRT and GW involving Canadian National Railways Company. (Board file 766:847).
4. Collective agreement 1.9 (unit of engineer officers in the Digby - Saint John Service). Certification issued by former Board on August 24, 1960 to CBRT and GW involving Canadian Pacific Railway Company. (Board file 766:1169). However, that certificate was amended by the former Board on June 5, 1963 (Board file 773-76) when the vessel S.S. Princess Helene was replaced by the vessel Princess of Acadia. Subsequently, Canadian National Railways Company took over the Fundy Service and the Princess of Acadia from Canadian Pacific Railway Company and continued to voluntarily recognize the CBRT and GW as bargaining agent for the same unit

of engineers. But neither the bargaining agent (CBRT and GW) nor the employer ever bothered to ask the Board to update that certification. Here again the decision of 1989 by this Board swept aside a series of cobwebs with the creation of a single unit of licensed personnel since for a while in that Service, you had the certified SIU representing some unlicensed personnel on board vessels and the CBRT and GW representing groups of licensed and unlicensed personnel on board vessels.

5. Collective agreement 6.1. This is more complicated. On November 15, 1951, the former Board certified a unit of mates in the Newfoundland Service to the Canadian Merchant Service Guild and involving Canadian National Railways Company (Board file 766:273). On May 20, 1952, the same CMSG filed a similar application for certification in the P.E.I. - New Brunswick Service before the former Board (file 766:342). That Board rejected that application for lack of support in the unit found appropriate. (That Board had earlier approved a request by Canadian National Railways to exclude junior masters and first officers from the proposed bargaining unit.) However, the former Board reconsidered its decision about the appropriate unit, ordered a vote, and granted certification. (Board file 773:12). That unit consisted of first and second officers. On January 27, 1982 upon an application for certification (not a review application) this Board consolidated the two certified mate units above with the mates

working in the Yarmouth Service and which benefited from a voluntary recognition by the then CN Marine Inc., which had begun to take over from Canadian National Railways Company and also with the mates in the Saint John - Digby Service which by now had been acquired by Canadian National Railways Company from Canadian Pacific Railway Company and involving now CN Marine Inc. (This Board's file 555-1682). Therefore, by then, all deck officers on all vessels operated by CN Marine Inc., were in one single unit certified to the CMSG.

6. Collective agreement 1.2 (unit of chief stewards, assistant chief stewards, pursers, assistant pursers and purser stewards in the Newfoundland Service, both gulf and coastal). This collective agreement was the result of a voluntary recognition given by the Canadian National Railways Company to the then Canadian Brotherhood of Railway Employees and other Transport Workers (former name of the CBRT and GW). A survey of this Board's archives which contain files of its predecessor, would seem to indicate that this voluntary recognition occurred shortly after Newfoundland joined the Canadian Confederation (circa 1949-1950). The terms of the constitutional "agreement" included the taking over inter alia, by the Canadian government of the responsibility to maintain the existing maritime transportation between Newfoundland and other maritime provinces. The federal government confided this responsibility to the Canadian National Railways Company. The latter

included a marine division which eventually became CN Marine Inc. and finally a new separate crown corporation, namely, Marine Atlantic Inc. During all of these years, that voluntary recognition and the collective agreements which resulted therefrom were continued.

The same survey in this Board's archives has also revealed that all of the certifications issued by the former Board except for one, were not accompanied with reasons for decision. The one exception concerns collective agreement 7.1 (unit of unlicensed personnel in the Digby - Saint John Service) where on May 13, 1950, the S.I.U. was certified vis-à-vis the Canadian Pacific Railway Company. Said reasons for judgment did not deal with the description of the unit. The certification order in that file 766-135 excluded the chief steward, the purser and the assistant purser classifications in that bargaining unit: no reasons.

The certification order in file 766-609 (collective agreement 1.4) (unit of unlicensed personnel) issued on March 22, 1956 excluded from the Yarmouth - Bar Harbour Service, the purser, assistant purser, chief steward and chief cook classifications in that bargaining unit: no reasons. This certification involved the Canadian Brotherhood of Railway Employees and Other Transport Workers (now CBRT and GW).

The certification order in file 766:100:49 (December 16, 1949) (collective agreement 1.1) (unit of unlicensed personnel) read as follows:

"a unit comprising uncertificated personnel employed on vessels owned by the Government of the Province of Newfoundland and operated by the Canadian National Railways, save and except the classifications of Purser and Chief Steward."

The certified bargaining agent was the CBRE and Other Transport Workers, now, CBRT and GW.

However, it is to be noted that these classifications of Purser and Chief Steward became part of the licensed personnel on the Newfoundland Service which was the object of a voluntary recognition by Canadian National Railways and together with the classifications of assistant chief steward, assistant purser and purser steward formed the scope of collective agreement 1.2 described above: a unit of 80 employees at the last count and prior to the restructuring of 1989 by this Board.

As regards the second bone of contention: that is, the classification of chief cook. In the unlicensed personnel group of employees, the certification order (file 766:100:49) did not exclude that classification and, as already seen, collective agreement 1.1 included not only 6 chief cooks but even three senior chief cooks: this is the Newfoundland Service and the bargaining agent is CBRT and GW.

In collective agreement 1.4 (Yarmouth - Bar Harbour Service) the classification of chief cook is excluded (there are two of them) and the certification order (file 766:609 of March 22, 1956) excluded that classification (see above). The union involved was CBRT and GW, (or its predecessor CBRE and OTW).

Agreement 1.6 (P.E.I. - New Brunswick Service) does not have chief cooks but does have two (2) senior chief cooks although Marine Atlantic occasionally "staffs in" senior second cooks as senior chief cooks.

Agreement 7.1 (Digby - Saint John Service) (Princess of Acadia) does not employ any cooks. This service has been contracted out to an outside catering firm.

The net result of the situation prevailing now after the 1989 decision of the Board to reduce four (4) bargaining units in the unlicensed onboard groups of employees to one, is that six (6) chief cooks are included in that bargaining unit and two (2) are not. The net result of the situation prevailing now after the 1989 decision of the Board to reduce six (6) bargaining units in the licensed onboard groups of employees to one, is that fifteen (15) chief stewards are included in that bargaining unit and four (4) are not; there are twenty-nine (29) assistant chief stewards included but twenty-three (23) are included in the licensed certification and six (6) are included in the unlicensed certification; there are eighteen (18) pursers included in the licensed unit and six (6) excluded; there are twenty four (24) assistant pursers included in the licensed unit and two (2) are not.

The one bargaining unit determined to be appropriate by this Board in 1989, in the licensed class of employees regroups some 391 employees. This review application asks that fourteen (14) more be added to it.

- . The one bargaining unit determined to be appropriate by this Board in 1989, in the unlicensed class of employees regroups some 1200 employees. This review application asks that two (2) more be added.

The bargaining certificates issued by this Board on July 4, 1989 to the CBRT and GW, regarding the onboard licensed personnel for one and the onboard unlicensed personnel for the other, read as follows respectively:

"all licensed personnel aboard all vessels owned or operated by Marine Atlantic Inc., previously covered by collective agreements 1.2, 1.3, 1.5, 1.7, 1.9 and 6.1."

and

"all unlicensed personnel aboard all vessels owned or operated by Marine Atlantic Inc., previously covered by collective agreements 1.1, 1.4, 1.6 and 7.1."

IV

After having received the report of the investigating officer and further representations in writing by Marine Atlantic thereon, the Board met and reviewed the whole file. It has come to the conclusion that no public hearing is required to dispose of this application (consisting of files 530-1762 and 530-1763).

V

The Canada Labour Relations Board wrote four key decisions concerning its interpretation of former section 119 of the

Canada Labour Code, now section 18, or the review section which read in 1973 and still reads as follows:

"119. The Board may review, rescind, amend, alter or vary any order or decision made by it and may rehear any application before making an order in respect of the application."

This is the section which is of import in the instant case.

The first decision was Employees of the Regional Comptroller and Canadian National Railways and Canadian Brotherhood of Railway Transport and General Workers (1975) 9 di 20; [1975] 1 Can LRBR 327; and 75 CLLC 16,158 (CLRBR no. 41).

That first decision outlined three different types of review applications contemplated by section 18.

"1. Where a bargaining agent has been certified by a decision of the C.L.R.B., at a later date the Board may be asked to review its original order to enlarge or to otherwise alter the bargaining unit for which the bargaining agent is certified. Such an application, although filed under Section 119 of the Code, is basically of the same nature as an application for certification. In such a case, if the application is granted, the revised order will be substantially different from the original one and, accordingly, such an application may only be granted if the applicant meets the basic requirements laid down in the Code for the granting of the original order.

2. Whenever an order or decision of the Board has a continuing effect, and this is typically the case where a Certification Order has been issued, various circumstances may change which may require corresponding amendments or clarifications of the Board's original decision. For example, the name of the bargaining agent or that of the employer may have changed or the classification titles referred to in the Board's order may be replaced by new ones. Alternatively, new classifications may have been created and it may be unclear whether they are dealt with by the Board's original decision. In such a case, an application may be filed under Section 119 asking the Board to review and alter its decision or to clarify it. Here, an eventual decision on the application for review will not change the nature and effect of the original Board's order. It will simply up-date or clarify the wording of the decision and,

accordingly, the Board must simply be satisfied that these changes are in order.

3. A party which is dissatisfied with an order or decision of the Board may also apply to the Board under Section 119 of the Act, asking it to review and reconsider its original decision and to issue a new order or decision,..."

(pages 25; 334-335; and 1184-1185)

In British Columbia Telephone Company (1977), 22 di 507; [1977] 2 Can LRBR 404; and 77 CLLC 16,108 (CLRB no. 99), the Board dealing with an application for review stated:

"...The Telecommunication Workers' Union was then advised by the Board that 'while this is an application to have the Board vary the existing certificate, it will be processed in accordance with the Board's established practice for the investigation of applications for certification'... At all times, the position of the Union was that it was simply requesting the Board to make a ruling pursuant to section 61(1) of the Code to determine that the persons affected were employees within the meaning of the Code and were included in the bargaining unit for which it was already certified. The position of the Board, as expressed in correspondence under the signature of its then Chief Executive Officer, was that the matter could only be dealt with pursuant to section 61(2) of the IRDI Act and that the applicant union was required to establish to the satisfaction of the Board that it had 'a mandate from the employees in the classifications listed in the request for review'. The position of the Board was apparently that it was without authority to make the decisions requested by the Union. It may be useful to quote from a letter addressed by the Chief Executive Officer of the Board to the Telecommunication Workers' Union and dated June 29, 1971:

'It is quite right, as stated in your application of May 12, 1971, that the wording of the Board's certificate issued on February 23, 1949, is sufficiently broad to include additional classifications initiated by the company after the date of the said Order of certification providing both parties are in mutual agreement regarding such inclusion. Where the parties fail to agree that the incumbents of newly created classifications are employees within the meaning of the Act and hence within the meaning of the order of certification, the bargaining agent has two options opened to it, namely (a) the filing of a new application for certification under Section 7 or Section 8 of the Act, and (b) the filing of a request for review pursuant to the

provisions of subsection (2) of Section 61 of the Act.

Under either option, the Board's policy is to ascertain whether the applicant trade union has as members in good standing a majority of the employees comprising the group which it wishes added to the unit and in respect of whom it seeks the right to bind them by collective agreement.'

Shortly afterwards, the Union withdrew its application for review."

(pages 515-516; 411; and 661-662); emphasis added)

"In any event, and whether we like it or not, it is a well-known fact of industrial relations in this country that, over the years, employers and trade unions have bargained over the application of a collective agreement and have concluded agreements which may be incompatible with the terms of a certification order issued by the Board. ... In the name of preserving the effectiveness and continuing validity of a certification order issued by it, the Board will not use the discretion vested in it by Section 119 of the Code to rescue a trade union from 'poor deals' made at the bargaining table, particularly when a union later seeks to invoke bargaining rights against the very employees which it has abandoned or ignored over a long period of time. ..."

(pages 523-524; 418; and 667)

"The Board cannot and should not ignore the 'facts of life'. When an employee is hired or promoted into a position by an employer and is led to understand by that employer's representatives that he is now a 'manager' and entitled to receive the 'privileges' normally accruing to the managerial ranks, it is not very likely that this person will be inclined to obtain or retain membership in the trade union representing the 'ordinary' employees of that employer. If, as a result of his alleged promotion from the bargaining unit, the employer stops deducting union dues from that employee's salary, as required under the collective agreement, only a very determined and exceptional individual will take the necessary steps to maintain his membership by directly forwarding to the trade union the requisite financial contribution. It is clear that a union attempting to recruit a member under these conditions is at least severely handicapped. Furthermore, it is equally clear to us that, normally, a trade union should not be required to do so. ..."

(pages 526; 420; and 669)

"...The Certification Order at issue in this application for review was issued by the Board on February 23, 1949. A review of the Board's files with regard to the original application for certification is singularly uninformative. The file contains little or no information with regard to the employer's organizational structure or with regard to the reasons

which warranted the exclusion of certain classifications from the unit and it is therefore difficult to ascertain the intended scope of the bargaining unit described by the Board in the certification order. ..."

(pages 527; 421; and 670)

In British Columbia Telephone Company (1978), 28 di 909; [1970] 2 Can LRBR 387; and 78 CLLC 16,146 (CLRB no. 140), the Board again elaborated on section 18 of the Code. In fact this decision was interwoven with the preceding British Columbia Telephone Company (99) decision:

"At the commencement of the hearing, the employer, Moffatt et al., and TEMPO, an organization seeking to organize persons affected by this application, advanced a preliminary objection to the Board entertaining this application on the basis that the applicant had not demonstrated any membership support among those persons it seeks to have declared as included in its bargaining unit. The Board heard lengthy argument on this objection from all parties on May 8 and 9 and adjourned to consider this issue. These are the reasons for decision on the preliminary objection.

II

This application and the matters at issue have a long history which is recounted in the Board's decision in British Columbia Telephone Company, 22 di 507; [1977] 2 Canadian LRBR 404. ...

The preliminary objection raised by the employer and other parties is that the collective bargaining realities of the history of the relationships between the union, employees and employer demand that the Board canvass the wishes of the employees before it accedes to the union's request. It is submitted that the legal effect of the description of the bargaining unit in the original certification order is spent, for all practical purposes, by virtue of the intervening events since its issue, and that the Board ought to adopt the policy articulated by courts and other labour relations boards which requires a trade union to establish majority support among a unit of employees sought to be added to an existing bargaining unit.

The parties raising the preliminary objection rely to a great extent upon the following statements by Chief Justice Laskin in Beverage Dispensers & Culinary Workers Union, Local 835 et al. v. Terra Nova Motor Inn (1974), 50 D.L.R. (3d) 253, at pp. 254-5 (S.C.C.)."

(pages 910 and 912; 388-390; and 539-541; emphasis added)

The decision then quotes a long extract of Laskin, C.J.C. in that judgment.

Then the reasons go on thus:

"With respect to the policy of canvassing the wishes of employees sought to be added to a bargaining unit, reliance is placed upon the decision of the Supreme Court of British Columbia in the Board of School Trustees of School District No. 57 (Prince George) v. International Union of Operating Engineers, Local No. 858 and Labour Relations Board, [1974] 1 W.W.R. 197, as adopted by the British Columbia Labour Relations Board in Olivetti Canada Ltd., [1975] 1 Canadian LRBR 60; Reliance Lumber Co. Ltd., [1975] 1 Canadian LRBR 101; and Automatic Electric (Canada) Limited, [1976] 2 Canadian LRBR 97.

The position of the union in response to this preliminary objection can be briefly summarized as relying upon the language of the certification order issued by the Board as vesting it with a legal right to represent all employees that fall within that scope. ... it is the union's submission that it need not demonstrate that it has majority membership support among the employees it seeks to have declared as included in the bargaining unit."

(pages 913-914; 390-391; and 541-542)

Then the panel of the Board went on to establish the basis for its decision to support the preliminary objection:

"Even accepting the union's position as established, although we have not heard the evidence, we disagree with the union's proposition that in the circumstances of this case, it is not required to establish membership support among employees it seeks to represent before they are added to the bargaining unit covered by the existing collective agreement and currently represented by the union. ...

...we do not accept the union's proposition that it has a legal right to represent the classifications it seeks by virtue of the certification order issued in 1949. ..."

(pages 914; 391; and 542)

"As recognized by Chief Justice Laskin, it is common practice in all jurisdictions for an employer and a trade union in its negotiations of a collective agreement to give more precise meaning and content to a certification order of a labour relations board than that of the generic language used to describe a bargaining unit. This commonly accepted practice

allows parties to adjust their relationship to the practicalities of collective bargaining and to make changes throughout the years as the employer's organizational structure or operation alters. The Board does not exercise a continuing supervisory authority over certification orders that it issues. The certification order coupled with notice to bargain gets collective bargaining started by imposing an obligation to bargain on the employer.

Once negotiations commence the commonly accepted practice is that the parties give more detailed meaning and expression to the description of the bargaining unit set out in the certification order. In this respect, the descriptive effect of the certification order is spent. This is particularly so in the case of a bargaining unit description referred to by Chief Justice Laskin as one 'designating the job classifications or work categories in which the employees to be represented in collective bargaining are employed'. The practice of describing bargaining units by listed classifications is one that was followed for several years by this and provincial boards. Because of the problems that resulted from that mode of describing bargaining units, most labour relations boards have abandoned that approach where possible and describe bargaining units in terms of all employees excepting certain listed classifications. The practical effect of this 'all employee' description of bargaining units is that the onus is on the employer to establish that new classifications created by the employer should be excluded from the bargaining unit. Failing acceptance of that proposition by the union, the remedy for the employer is to bring the matter to the Board.

...

Although it was unusual for this Board to issue a certification order with an 'all employee' description of bargaining units in 1949, such was the case in the certification order issued with respect to this union and employer. The union therefore had the advantage of an "all employee" unit description and could have placed the onus on the employer to establish before the Board that any newly created classification should be excluded from the bargaining unit. However that is not what occurred. Instead the union and employer negotiated collective agreements in which the definition of the scope of application of the collective agreement was set out by reference to listed classifications of employees. Its position now is that, notwithstanding that it has acceded to this system of defining its bargaining unit, it can rely upon the strict legal application of the description of the bargaining unit set out in the 1949 certification order.

We cannot accede to that position by the union. It flies in the face of a practical understanding and appreciation of collective bargaining realities and runs counter to fundamental principles expressed and incorporated in the Canada Labour Code. We accept the policy articulated by the British Columbia Labour

Relations Board in Automatic Electric (Canada) Limited, supra, at p. 100.

'The Board should not take a broad unit description, written a long time ago in a certification which served to get collective bargaining underway, and apply it in a literal fashion in the real-life employment environment which has been shaped by a later agreement by the parties about the precise scope of the unit. If, in fact, the effective unit specified by the collective agreement is a coherent and appropriate one and if the union has not violated its duty of fair representation in negotiating it, then this Board should accept that unit as the basis for further proceedings and, if necessary, vary the wording on the certification so that it will accurately reflect the current realities. If the union then wishes to expand the scope of its bargaining authority over a group of employees whom it has not hitherto represented...it should first organize these employees.' "

(pages 915-917; 392-393; and 543-544; emphasis added)

The panel then went on in the following fashion:

"The reasons for this policy are multiple and do not need extensive elaboration. Among them are the following. First, the incorporation of employees previously unrepresented into a bargaining structure without reference to their wishes places easily foreseeable strains upon the relationships between the employer, the union and the employees. If a large number of employees is included against the union's wishes and at the behest of the employer, the union could find itself faced with an application for decertification of the entire unit and lose representational rights for those it previously represented. The addition of employees to an established bargaining relationship without reference to their wishes creates immediate and foreseeable conflicts between them and employees in the established bargaining structure. This conflict can be expressed by employees who are added to the unit refusing to participate in internal union affairs, refusing to respect picket lines established by the union, and acting on behalf of extra-bargaining unit employees, or maybe even the employer, to undermine the authority and activities of the union. The predictable results are industrial unrest and an undermining of the role of trade unions in industrial society.

Secondly, an accretion to a bargaining unit of employees who have been hitherto excluded from the bargaining structure without reference to their wishes can result in a loss of society's perception of the integrity of a collective bargaining system and its fairness. This result was perceived by Mr. Justice Laskin when he sat as a Justice in the Ontario Court of Appeal in Regina v. Canada Labour Relations Board, ex

parte Martin et al., [1966] 2 O.R. 684. In that case, a bargaining agent which represented 7,342 employees applied to this Board for certification as the bargaining agent for a unit of 10,389 employees, including those for whom it was already the bargaining agent. This procedural device was an attempt to include 3,049 employees into an existing bargaining unit without canvassing their wishes. The Canada Labour Relations Board granted that application for certification and that decision became the subject of an application for judicial review. The Ontario Court of Appeal found that the Board had not made a jurisdictional error but the concerns of Mr. Justice Laskin should not go unnoticed.

'If the proceedings in the Courts, both below and here, had been by way of general appeal, I would have been inclined to set aside the order of the Canada Labour Relations Board which is impugned here. I believe the Board showed poor judgment in exercising its discretion under its governing statute and its governing Rules.' (p. 690)

'I or others might think it unfair of the Board to lump into one bargaining unit some 3,000 employees with no history of collective bargaining and, indeed, no wish to begin such a history, with some 7,000 employees who have a long history of union organization and collective bargaining relationships. It is not for me to speculate at length on why the Board thought that the comprehensive unit sought by the Brotherhood should be established. Of course, it would make the Brotherhood a stronger collective bargaining agent of employees if it was entitled to speak for a larger group. The Board may have felt that integration was preferable to fragmentation in collective bargaining in industries of national scope. The decision was for it to make, and the fact that there was a past history of separate units was merely a factor which it could reject as no longer compelling. In deciding for the one embracing union it could not but be aware that many employees, hostile to collective bargaining or perhaps only to the applicant union, would, if the application for certification was successful, be swept into a regime where individual bargaining would disappear.' (p. 694)

...

The cornerstone of Part V of the Canada Labour Code is the freedoms given to employees and employers in section 110 of the Code. The tradition of collective bargaining legislation in Canada, reflected in the provisions of the Code, contains the implicit understanding that a trade union becomes the bargaining agent for employees only through an expression of a desire for representation by a majority of employees it has not represented. To run counter to that tradition, in this case, where the union relinquished the benefits

of the 'all employee' description in its bargaining unit, would create a hostility to collective bargaining by the employees added to the bargaining unit and the understandable impression that the collective bargaining system under the Code was designed or being administered for the benefit of trade unions as institutions and not for the interests of employees. This would be even more emphatically the case in the circumstances of this application where the Board has received active representation and express communication by a large number of persons in the classifications sought to be added to the unit expressing a desire not to be represented by the applicant union.

We wish to add that there are cases where the Board may properly amend the language of a unit description to give clearer expression to its original meaning (see Millar & Brown Ltd., 26 di 572; [1979] 1 Can LRBR 245).

...

A third reason for the policy articulated in Automatic Electric (Canada) Limited as it applies to this case is that if the Board acceded to the union's request we would ignore the interests of employees who have grown to accept and expect that their employment relationship is regulated in a manner other than by representation by the applicant union. Previous decisions by the Board have determined that persons thought not to be employees under the Code are employees (British Columbia Telephone Company, 20 di 239; [1976] 1 Canadian LRBR 273; and [1977] 2 Canadian LRBR 385) and that some wish to be represented by trade unions other than the applicant union (British Columbia Telephone Company, 22 di 507; [1977] 2 Canadian LRBR 404). In the specific history of this employer's operation, to include these persons in the bargaining unit represented by the applicant against their wish would be a denial of a perceived right by them to choose representation by an organization of their choice. Of course when such a matter is finally determined by the Board their bargaining unit preference may be limited by appropriate bargaining unit policies of the Board."

(pages 917-919; 393-395; and 544-545; emphasis added)

And the panel of the Board concluded in the following fashion:

"Against this background we have determined that we will not reinterpret the original certification order in its application to the existing circumstance to include persons in the applicant's bargaining unit other than those currently covered by its collective agreement without reference to the wishes of employees sought to be included. It is wholly unrealistic and impractical in labour relations terms to expect that the Board should turn back the pages of history and several collective agreements to interpret the language

of a certification order that was wholly ignored for two decades. Such an act by us elevates the importance of a certification order beyond that commonly attached to it and understood in labour relations circles and runs counter to the policies of the Code."

(p. 920; 395; and 545)

VI

The original reply of Marine Atlantic to the application under study, dated September 18, 1989 read in part as follows:

"Applicant seeks to avoid such legal requirements by using a section 18 application. We submit respectfully that the evidence of support being absent, the application should be dismissed immediately as lacking an essential element, the minimum support among the personnel it seeks to add to the existing units.

The Board in very similar circumstances, in the B.C. Telephone case (decision #140, 28 D.I. 909) ruled that if a union wishes to expand the scope of its bargaining authority over a group of persons it has not hitherto represented, it should first organize them.

In addition to the legal and jurisdictional reasons for this requirement, the Board added the following:

'Secondly, an accretion to a bargaining unit of employees who have been hitherto excluded from the bargaining structure without reference to their wishes can result in a loss of society's perception of the integrity of the collective bargaining system and its fairness.'"

Obviously then, Marine Atlantic was reproducing, in part, the quote appearing in these reasons for decision at page 28 above. In British Columbia Telephone Company (140) supra, this Board, as we have seen, having to deal with a review application by a union, heard a preliminary objection, adjourned its hearings, deliberated and

sustained the objection, thereby dismissing the application.

It would seem that Marine Atlantic, relying on the contents of the reasons for decision issued in that case, has decided in the instant case to adopt the same approach: a preliminary objection.

However, as to the cogency of the contents of those reasons for decision, the Board reminds the parties that, one year after British Columbia Telephone Company (140), supra, in Teleqlobe Canada (1979), 32 di 270; [1979] 3 Can LRBR 86; and 80 CLLC 16,025 (partial report), it commented further and extensively upon section 18 of the Code and its application by panels of the Board in Canadian National Railways, supra, and in the **two** British Columbia Telephone Company cases, supra, and more particularly upon the 1978 one.

In Teleqlobe Canada, supra, the Board stated:

"...And when in the British Columbia Telephone Company, 22 di 507 case the Board says:

'Of course, a bargaining relationship need not for that reason remain forever static.'

(p. 521)

we would like to add that the union's position may not stay congealed nor that of the employer. In the one case, as well as in the other, it may happen that it becomes imperative, in order to maintain orderly labour relations, that the parties have rapid and ready access to a procedure for revising bargaining units.

...

In British Columbia Telephone Company, 22 di 507, the Board clearly identified the difficulty encountered by the Task Force when it gives a detailed account of the difficulties of the Telecommunication Workers' Union with our predecessor Board, in particular the extract

from the letter sent to the union at that time explaining its policy when dealing with applications for review. That policy held that in cases of revision involving the adding of employees in an already existing unit, the union must always demonstrate the support of a majority of these new members of the bargaining unit. [See quote in these reasons at page 18.)...]

If one puts this policy of our predecessor Board,... it becomes obvious that the revision of one of those certificates was a major operation for a union. A determined employer could make life very difficult for a union while at the same time eroding its bargaining unit. ..."

(pages 303-304; and 113-114)

A little further it added:

"Prior to 1973, because of the difficulties experienced by unions in attempting to cope with the problem of having the composition of bargaining units reviewed, some unions acted by way of certification applications when the facts, as demonstrated by the archives, indicate that in reality the circumstances very often warranted a review or a modification of a unit apparently appropriate. It would seem that such was the case in Regina v. Canada Labour Relations Board, ex parte Martin, et al. [1966] 2 O.R. 684, thus commented upon by this Board in British Columbia Telephone Company, 28 di 909:

'This procedural device was an attempt to include 3,049 employees into an existing bargaining unit without canvassing their wishes,'

(page 916)

This comment, which is a judgment on the methods used by some unions, as we have just explained, to circumvent the difficulties surrounding a review prior to 1973, appears to be too severe because one should not forget that, in using that method, the union in question was imposing upon itself serious problems which, in our opinion, it should not have been confronted with if it could have proceeded by way of an application for review."

(pages 307; and 117)

"Parties which come before this Board must understand that they now have an easy and progressively more rapid access in all circumstances when they estimate that it is in their interest, in order to ensure a harmonious and fruitful relationship in the administration of the object of a certification, to amend, review or modify the definition of the description of a bargaining unit.

...

The crucial problem in review applications has always been and remains that of canvassing or not the wish of employees sought to be included by a review application. ...

The Board considers that any certification order has a continuing effect and, thereby, a great number of changed circumstances will require that it may be called upon to verify either the designation of the parties, the definition of the unit, or its composition.

What we must understand from the decision in Canadian National Railways, supra, is that the key sentences in the first two types of situation therein explained are:

'1. ... Such an application filed under Section 119 of the Code is basically of the same nature as an application for certification. In such a case, if the application is granted, the revised order will be substantially different from the original one.'

(p. 25)

'2. ...Here, an eventual decision on an application for review will not change the nature and effect of the original Board's order.'

(p. 25)

It may well happen however that in one case as in the other, it entails the addition, for example, of 100 employees to a unit already comprising 200. However, in the first instance there will very probably be a verification of the wishes of the 100 employees sought, whereas in the second instance, there will probably be no such verification."

(Pages 309; and 118-119)

Regarding cases of the second instance referred to at the end of this quote, the Board in Teleqlobe Canada, supra, went on to state:

"They all evoke in the minds of many people the specter of a sweeping in of employees into a bargaining unit without anyone having been concerned with their wishes.

It is evidently what Mr. Justice Laskin had in mind (member of the Appeal Court of Ontario as he was then) in Regina v. Canada Labour Relations Board, ex parte Martin, et al., supra, when he stated:

'In deciding for the one embrasive unit the Board could not but be aware that many employees, hostile to collective bargaining or perhaps only

to the applicant union, would, if the application for certification was successful, be swept into a regime where individual bargaining would disappear.' (p. 694)

The facts in the case dealt with by Mr. Justice Laskin were quite different from those hypothesized in the present analysis, from the *modus operandi* of the then Canada Labour Relations Board, as well as the law then in force, ...

One of the key changes which intervened when the monopolistic representation system by one union in an appropriate bargaining unit, as found by a labour board was introduced, has been the statutory 'sweeping in'. To obtain certification it is sufficient to represent an absolute majority: that is 50% + 1 workers.

But the majority rule takes precedence.

Thus the law, which seeks to attain superior objectives, wants it. On this point, the Board cannot but reiterate the following quote from its decision in British Columbia Telephone Company, 22 di 507:

'...However, in order to make the determination required by section 126(c) of the Code, the Board does not and must not consider the wishes of individual employees or of employees in given positions or classifications but the overall wishes of all the employees included in the unit which it has found appropriate. ... In such a context, it is unavoidable that some employees or groups of employees may disagree with the majority and that their wishes may have to be subjected to those of the majority. There appears to be no valid justification to depart from this principle in the context of an application for review made pursuant to section 119 of the Code...' (p. 526) (The Board was then dealing with the second type of review applications e.g. Canadian National Railways, supra).)"

(pages 312-313; and 121-122; emphasis added)

Teleqlobe Canada, supra, added the following important remarks:

"On the same subject, Canadian legislators have in recent years gone one step further in labour codes. A union may now precipitate a representation vote as long as it shows that it possesses x percentage (numbers vary) of members, even if it does not hold an absolute majority (50% + 1 and between 35% and less than 50% for a mandatory representation vote in the federal legislation). And this provision (federal) is governed by the following modalities: as long as 35% of the eligible voters vote, the majority of those votes constitutes evidence that the majority of the employees

in the unit are of the same opinion expressed in the vote (Section 129 of the Code).

In practice, 18 favourable votes against 17 negative and the Board must certify a union to represent a bargaining unit of 100 employees. Thus 82 employees will be 'swept in' into a bargaining unit.

Some will obviously say that at least they were given an opportunity to express their wish.

What then of the build up theory? ... implicitly a number of future employees, without ever having had the opportunity to express their wish, shall be 'swept in' into the bargaining unit. ..."

(pages 314-315; and 123

"This Board is therefore of the view that the reconciling of the wishes of Parliament towards the rights of employees to freedom of association, their rights to fair representation, the rights and obligations of certified unions, the rights of the public to orderly labour relations through the determination of viable and realistic bargaining units, and the rights of employers to operate their enterprises in an efficient manner, constitute an exercise in balancing where it may happen that some rights, which were believed before to be carved in marble, may sometimes have to be balanced against others which the public good makes it imperative to favour.

The Board shall receive an application for review whereby there will be an amendment, a variation, a clarification, a modification, etc., of a bargaining unit at any time when the eventual decision of the Board thereupon will not change the essential and fundamental nature nor the object of its initial ordinance. ...

Generally speaking, in all of these cases, including a substantial increase in the number of employees in a bargaining unit, the Board will determine them in such a manner that it will act under Section 119 but without canvassing the wishes of the employees sought to be represented by the certified union.

What criteria will the Board follow to determine whether or not the review application changes the nature and object of its original ordinance?"

...

In Quebec, the Labour Relations Board and its successor, the Tribunal du Travail, have developed a criteria for interpretation which is interesting in that it explores the concept of the 'intended scope' of the original certification order. ..."

(pages 316-317; and 125-126; emphasis added)

"In provincial jurisdictions other than Quebec, we see that since 1974, in British Columbia, ... the practices and policies of that Board as regard the revising of

certifications orders are contained in the new Section 36: ...

Lastly, cases of revisions coming under the second type in Canadian National Railways, supra, would appear to be dealt with under the provisions of Section 34 of that Code, S.B.C. 1973, c. 122. ...

If this general analysis is correct, that Board would dispose of its applications for review according to guidelines almost similar to those enunciated by this Board in the instant case. Thus, in 'varying' cases, it canvasses the wishes of the employees, which it does not do in cases coming under Section 34. That is why in the case of Olivetti Canada Ltd., [1975] 1 Can LRBR 60, upon a bargaining agent requesting a modification of a bargaining unit, geographically restricted, in order to include employees working in a different locality, the B.C. Board did canvass the wish of these new employees. Similarly, in Reliance Lumber Co. Ltd., [1975] 1 Can LRBR 101, a bargaining agent certified to represent all the employees of an employer excepting its clerical employees and its salesmen and who sought, by the guise of an application to vary, to include them in that same unit without bothering with the wishes of the clerical employees and salesmen was denied, since its application substantially changed the nature and essence of that unit, as we stated in Canadian National Railways, supra.

As to Automatic Electric (Canada) Limited, supra, referred to approvingly by two panels of this Board in British Columbia Telephone Company, 22 di 507, 28 di 909, the facts involved in this application under Section 34, show clearly that this was a very special case, not well suited to the establishment of general rational criteria to deal with ordinary cases of revision. It is then perilous to tie a policy of interpretation and application of our powers of review of bargaining certificates into a case which emanated from such particular and specific facts. That case had to do with a bargaining unit certified in 1963. It was a clerical employees bargaining unit but did not encompass the salesmen in the employ of the employer. In 1974, the certified union was seeking under Section 34 to include them in that same unit but without having signed up one single salesman.

This is why we agree with the following statement in that decision:

'If the union then wishes to expand the scope of its bargaining authority over a group of employees whom it has not hitherto represented, ... it should first organize these employees.'

But our agreement must be interpreted as being limited to certification situations where a bargaining agent asks the Board to revise a unit by including therein employees occupying classifications or functions which are so dissimilar with those contained in the unit that the unit's nature would be changed and that the revised unit would be substantially different from the original one." (pages 322-324; and 130-132; emphasis added)

And in Teleqlobe Canada, supra, the Board more than tempered the adoption of the policy articulated by the British Columbia Labour Relations Board in Automatic Electric (Canada) Limited, [1976] 2 Can LRBR 97 (B.C.), by panels of this Board in both British Columbia Telephone Company cases, supra.

More particularly, Teleqlobe Canada, took exception to the three reasons advanced by the panel of this Board in British Columbia Telephone Company (140), chaired by vice-chairman James E. Dorsey to support the policy of the B.C.L.R.B. Mr. Dorsey came to the Canada Labour Relations Board from the B.C.L.R.B., shortly after Automatic Electric (Canada) Limited was released (1976). These reasons have been reproduced at pages 28, 29, and 30 of the present reasons. In Teleqlobe Canada, supra, the Board stated as regards these three reasons:

"Indeed, it is true to say that the subsequent inclusion in a bargaining unit of employees who were not included before, because it had been determined that their affinities and interests were not common with those of the 'certified' employees, could constitute a source of tension and that it is better, after having verified the appropriateness of the new unit, to canvass the wish of the added employees prior to adding them to the bargaining unit. But it is just as true to say that tensions will develop if a certified union is not given easy access to adding to the already existing unit any new employee or group of employees whose functions or classifications do not indicate affinities or interests very divergent from those of the employees already in the bargaining unit.

It is true to say that the inclusion in an existing bargaining unit of a large number of employees against the wish of the union and according to the will of the employer, when one is dealing with employees having the same community of interest, could entail the loss of the representation rights by the bargaining agent. But it is as equally true to say, in such circumstances, that a contrary determination would favour the proliferation of bargaining units if these new employees opt to bargain collectively or else could culminate in a negotiation amounting to nil if the certified union enters into a collective agreement which applies to only a fraction of the employees who should rationally be covered by it. Because then, an employer could 'fish in trouble waters' without fear of legal recourse, by favouring the 'non-certified' employees. Because then, in case of a strike by the certified union, production could go on with the non-unionized and the lack of balance between the parties thereby fostered, could cause the eventual demise of that certified union.

It is true to say that one must, in general, avoid giving the impression to the public that the collective bargaining regime is not equitable and just by including in a unit employees who did not belong to it without consulting them and that this could create hostility among those employees towards collective bargaining and could create the impression that the regime instituted by the Code was drafted or is applied to favour the union as an institution and not in favour

of employees. But it is just as true to say that the Code was drafted on the basis of the exclusive monopoly of representation of bargaining agents, with the determination of the state to elevate certified unions precisely to the level of institutions with a very demanding role to play in our society. History shows that the initiative for this policy, certainly in Canada, did not come from the unions. However, it is certain that this new institution, the certified union, has been vested, in parallel to the advantages given with this new stature, with a variety of new obligations which society has gradually but surely demanded that it assumes. Of course the collective bargaining regime must be applied to the benefit of the employees. However, if there are conflicts, including strikes, prolonged by the existence of a large number of employees who are outside the bargaining unit, society gets impatient and accuses the union, not the employees. Society does not distinguish between the 'unionized' employees and the union: it only wants the union to settle what annoys it. For a long while, unions, voluntary associations, escaped certain recourses in front of the courts of the land. This same society was not moved when gradually these unions were assimilated, through all sorts of new juridical concepts, as legal entities subject to the wrath of law. Whenever violence occurs at the occasion of strikes and when legal proceedings are instituted, they are as serious, if not more so, against the unions than against employees who are its members: the institution is the target because it is perceived as responsible and chosen by law to maintain the rule of law.

Who, in society, worried in the past about the internal rules and by-laws of a union as a voluntary association? Today with the provisions of the Code regarding the duty of fair representation by unions, regarding unfair labour practices by unions vis-à-vis their members and other members of the bargaining unit, regarding union hiring halls, to mention just these few instances, the legislator and society have indeed become interested in these regulations and their application by unions.

What modern certified union can dispense with the services of external advisors such as lawyers, economists, specialists in labour relations when in the past the whole system was characterized by its lack of formalism?

One must thus counterbalance the perception of this same society and of these new employees included in a bargaining unit because it is appropriate for them to be so included, that the collective bargaining regime is just and equitable and that it is applied to the benefit of the employees. It must be counterbalanced with the imperative need to facilitate for unions, which have been institutionalized in order to make them responsible and accountable in the participation of equitable and just application and administration of the provisions of the Code, by giving them the means to act and the protections without which this task becomes impossible.

With the major, continual and complex modifications effectuated in the administrative structure of modern enterprises, it is important to relieve the certified unions from spending too much effort before labour boards in order to obtain clarification, variations or changes in the description of bargaining units after having spent themselves financially in organizing campaigns, when it implies strictly the inclusion of employees who belong *prima facie* in the certified unit.

The Board will not turn back the pages of history, as it pointed out so well in British Columbia Telephone Company, 28 di 909, but it shall not hesitate either, at the occasion of an application for revision made necessary by the adding of even considerable numbers of new employees, if it does not affect the fundamental and essential nature of the original certification, to dig into its archives to eliminate the necessity of subjecting a certified union to complex and aggravating review proceedings or to demonstrate representativity among new employees, especially after it had gone through a protracted struggle to deposit its original majority application for certification. To act otherwise would amount to ignoring other fundamental principles expressed and inserted in the Labour Code for several decades."

(pages 324-326; and 132-133)

Furthermore, in Teleqlobe Canada, supra the panel of the Board, after having studied the rationale for the policy developed by the B.C.L.R.B. as articulated in Olivetti Canada Ltd., [1975] 1 Can LRBR 60 (B.C.), and in Automatic Electric (Canada) Limited, supra, stated that it could not approve the policy of that Board.

After having quoted the following extract from Olivetti Canada Ltd.:

"...The [BCLRB] may 'reconsider' its decision, it may 'vary' any such decision, and for that purpose 'a certification of a trade-union... is a decision of the Board'. The provision has been interpreted by the Supreme Court of Canada as entitling the Board to make major alterations in the substance of a certification, rather than just clerical changes of name or address. In Oliver Cooperative Growers Exchange, 62 CLLC 15,428 (S.C.C.) Mr. Justice Judson described this as a 'plenary independent power of the Board necessary to enable the Board to do its work efficiently.' A similarly expansive reading of the scope of the then s. 65(3) was given by the Court in Bakery and Confectionery Workers

International Union v. White Lunch Ltd., 66 CLLC 14,110 (S.C.C.). There is no reason to suspect that the legislature intended a narrower view of the present s. 36."

(page 62)

it expressed it in this manner:

"The Canada Labour Relations Board agrees with this part of the B.C. Board's reflections in its Olivetti Canada Ltd. decision.

The present panel is perhaps not in agreement with subsequent reasoning of the B.C. Board in the same case when applying the consequences of what is reported above, they add:

'That does not mean that the Board should exercise its powers under s. 36 so as to finesse the applicable principles in other parts of the Code... The Board does deal with this special form of variance request in accordance with the policies reflected in ss. 39 through 45 of the Code and the regulations made under them. The Board does not permit trade-unions to avoid the membership and timing conditions set in s. 39. It sends out notices to be posted for the new group of employees, it receives and considers submissions from interested parties, it determines the appropriateness of the expanded bargaining unit, and it investigates the membership status of the trade-union in the new area of the unit which the union seeks to represent. This approach to the problem received judicial approval in the recent decision in Board of School Trustees of Prince George v. International Union of Operating Engineers [1974] 1 W.W.R. 197, where Mr. Justin Berger stated:

"I do not think the case at bar turns on this question. Whether the board acted under s. 12(4) or s. 65(3), it was bound to satisfy itself that a majority of the employees in the new unit were members in good standing of the union. I say that because I think it is fundamental to the scheme of the Act that a majority of the employees in the bargaining unit should be free to choose their bargaining agent. It is on that assumption that a union has the right to seek certification and to require the employer to bargain collectively... If the board was not satisfied as to that, it should have held a representation vote. Mr. Low argued that the board proceeded under s. 12(4) because in that way it would have to satisfy itself one way or another that the union had the support of a majority in the new unit. But I think that would have been required under s. 65(3) anyhow.

The Act does not say so. But it is there by necessary implication. In the ordinary case of an application for a variance there would be no difficulty. Variances usually involve adding employees to the unit or excluding employees from it. Seldom though would a variance alter the composition of the unit to such an extent that the question whether the union still had a majority would arise. However, if that question were to arise on a variance, the board in my opinion, would be bound to satisfy itself that a union applying for a variance under s. 65(3) had the support of a majority. Otherwise, a union could seek one variance after another, and thus augment the unit, far beyond its original numbers, without the support of a majority. By such a process of pyramiding, the variance procedure could be abused, and employees denied the protection of the provisions of the Act which say there must be a majority before the board can certify any union to bargain on their behalf. That would subvert the fundamental principle of the statute."

Within that framework, the Board does have jurisdiction to entertain this application for a variance brought by the Union.'

Following upon this, the British Columbia Board, according to its jurisprudence, seems always to require without distinction, in the case of the enlargement of a bargaining unit, that the applicant union demonstrates that it has the support of the majority of those employees to be added to the unit. If such is the case, this Board is not in agreement because of the distinctions drawn earlier in these reasons. In addition, this Board thinks that its conception of its powers by virtue of Section 119, which is equivalent to Section 36 in British Columbia, whereby in certain cases of employees being added to a unit, it does not feel bound to take into count the wishes of the employees added, espouses fully the interpretation of Mr. Justice Berger in Board of School Trustees of Prince George v. International Union of Operating Engineers, [1974] 1 W.W.R. 197. And this, with all respect for the Labour Relations Board of British Columbia. It seems to us, indeed, that Mr. Justice Berger in Board of School Trustees of Prince George did concern himself only with the overall majority in the enlarged or modified unit. We are in agreement and extend that agreement by insisting that this majority character be demonstrated within the group to be added when the basic character and intended scope of a bargaining unit are changed by a review application.

Meanwhile,... this Board will take into account only the overall majority status of the applicant union following an application for revision which does not

affect the nature of an existing bargaining unit but we will require proof of majority support among the employees added when the application for revision would radically change the bargaining unit. We believe this interpretation to accord in all major points with what Mr. Justice Berger stated."

(pages 331-332; and 138-139; emphasis added)

The concepts and the interpretation of section 18 (formerly 119) of the Code stemming from Teleqlobe Canada, supra, and which distinguished the policy of this Board from that of the British Columbia Board, have been constant ever since in the jurisprudence of the Canada Labour Relations Board, except for very minor adjustments.

This panel felt it necessary to replace in its proper and complete jurisprudential and juridical context the preliminary objection filed by counsel for Marine Atlantic Inc. in the instant case.

The Board has come to the conclusion that said preliminary objection is without merit for the following reasons.

Firstly, these applications flow from one all embracing review application by Marine Atlantic (Board file 530-1626) which was at the outset opposed by most of the bargaining agents involved. It proposed drastic changes in the existing scopes of a large number of bargaining units found to be appropriate by the predecessor to this Board who had certified a large number of bargaining agents.

It is evident that there was much merit in terms of sound labour relations in that all embracing review application in the eyes of the present Canada Labour Relations Board. Not only was it making it possible for more streamlined

labour relations for this employer to live with, but it was making it possible for a more efficient and coherent representation of employees vis-à-vis that employer. This Board went along in determining four new bargaining units where there was before a hodge podge of piece meal units. That must have been quite gratifying for Marine Atlantic.

Secondly, the reality is that the review application of Marine Atlantic was the equivalent of four applications for certification, in reverse. Which led to the obligation to define those new bargaining units or to give them a scope. This was necessary because of the further obligation to ascertain the representative character of the bargaining agents merged by the determination of the Board in each of these four new units. There was only one logical way to meet all of these requirements: votes. And then, who is eligible? All parties including Marine Atlantic were in agreement.

In the case of two of those bargaining units, no problem was encountered:

- a) in unit no. 3 (see page 5 above in these reasons): 9 shore-based unit of all maintenance employees;
- b) in unit no. 4 (see page 5 above in these reasons): a shore-based unit of all clerical and terminal employees.

But in the case of the other two units, problems occurred. They were raised by the CBRT and GW which pointed out to the Board that it wished to make representations concerning

both units (unlicensed and licensed personnel units no. 1 and no. 2: see page 5 above in these reasons).

Roughly speaking, former units merged in both new units contained some classifications similar or identical to others which were not so included. Queried about it, the CBRT and GW asked the Board to adduce evidence going to an overall review of the vertical scope of the new proposed bargaining units sanctioned by the Board. That evidence was estimated to last several days. Marine Atlantic objected strenuously. The Board was in a quandary. Here were parties who generally agreed to a major realignment of cumbersome and unworkable bargaining structures on the one hand, and on the other hand, another agreement rallying most of the parties including Marine Atlantic that to enhance fruitful collective bargaining it would be preferable to act very quickly on representation votes to ascertain the new bargaining agents prior to the outset of the incoming round of collective bargaining. The one notable exception to that second agreement was CBRT and GW who was suggesting that the realignment take effect only after the completion of that next round of negotiations.

The Board opted for a quick resolution of the identification of new bargaining agents.

Of course the existence of that dispute between CBRT and GW and Marine Atlantic did not facilitate the description of the bargaining units or scopes, a fundamental requirement to arrest the eligibility lists for votes. But the Board did not have at its disposal the number of days

of additional hearings required to resolve the apparent problems raised, prima facie, by the CBRT and GW.

The Board decided to resort to what has already been reported above in these reasons for decision in file 530-1626 (page 5 above).

The Board when adopting that approach was keeping in mind that problems could also occur in the two other bargaining units when the parties met in collective bargaining. Indeed, they would have to merge the texts of numerous collective agreements historically identified by numbers and decimals of those numbers: a throw back to the railway industry involvement with the employees now working for Marine Atlantic. So, in its order of June 1989, it issued descriptions of bargaining units tied to the coverage contained in the existing collective agreements where it could not do otherwise. Thus:

1. "All clerical and terminal personnel employed by Marine Atlantic Inc., previously covered by collective agreements 1.8, 2.1, 2.3 and 5.1."
2. "All shore-based plant maintenance personnel employed by Marine Atlantic Inc., excluding supervisory personnel and those above."
3. "All licensed personnel aboard all vessels owned or operated by Marine Atlantic Inc., previously covered by collective agreements 1.2, 1.3, 1.5, 1.7, 1.9 and 6.1."

4. "All unlicensed personnel aboard all vessels owned or operated by Marine Atlantic Inc., previously covered by collective agreements 1.1, 1.4, 1.6 and 7.1."

It is to be noted that in 2 above, the parties now have a modern generic description of that new bargaining unit. But the Board was completely mindful that when entering into collective bargaining, in the three other new bargaining units, the parties would have to do something about these references to former days and former bargaining structures.

However, for the purpose of quick votes the Board proceeded that way with a reminder to all that it would deal later with "alleged or existing incongruities". Obviously the Board was not satisfied with that temporary type of definitions of bargaining units.

The situation created by the application of Marine Atlantic via a review application under the provisions of section 18 (formerly section 119) of the Code is a relatively new development in the history of the new Canada Labour Relations Board since it began to apply the amended provisions of the Canada Labour Code in 1973. In fact, Canadian National Railways, supra; British Columbia Telephone Company (1979), supra; British Columbia Telephone Company (140), supra; and Teleqlobe Canada, supra, did not deal with situations similar to the one from which flowed the review application of Marine Atlantic. First, they all flowed from applications for review under section 119 made by unions. Employees of the Regional Comptroller distinguished, in a general way, between review

applications by parties which think that the Board has erred in a recent decision, review applications where various circumstances having changed, parties may require corresponding amendments or clarifications of the Board's original decision: change in the name of the bargaining agent or that of the employer being examples, and, review applications where a bargaining agent having been certified by the Board, the latter is being asked to review the original order to enlarge or otherwise alter the bargaining unit. Concerning this last type the Board added that such an application although filed under section 119 is basically of the same nature as an application for certification. If granted, the reviewed order will be substantially different from the original one and the application may only be granted if the applicant meets the basic requirements laid down in the Code for the granting of the original order.

An employer cannot make an application for certification.

Up until recently, the Board had to deal with large numbers of review applications by employers and unions where they thought that the Board had erred. The same is true of review applications by employers and unions where small modifications were required in an order. To a lesser degree, the Board had to deal with a number of review applications by unions where they were seeking to enlarge their unit by way of accretion or by way of a review application of the same nature as an application for certification. This is what was discussed at length in Teleglobe Canada, supra.

The review application by Marine Atlantic (530-1626) forms part of a new breed of review applications. It is review applications by employers to realign their bargaining structures. Nowhere had the Board in its jurisprudence since 1973, ever restricted the right of employers to use section 18 (former section 119) of the Code to achieve this goal.

Employers have been slow to realize the potential benefits which they could obtain through that avenue.

Besides Marine Atlantic, the most outstanding review applications of that new type would be Cape Breton Development Corporation and Canada Post Corporation. Both produced extensive reasons for decision by the Board: Cape Breton Development Corporation (1987), 72 di 73; 19 CLRBR (NS) 212; and 88 CLLC 16,005 (CLRB no. 661); Canada Post Corporation (1988), 73 di 66; and 19 CLRBR (NS) 129 (CLRB no. 675). There is another one pending before the Board involving VIA Rail. It is however of a smaller nature. But there is also large ones involving CBC, Canadian National Railways and Canadian Pacific Railways.

Some basic policies in these types of review applications have begun to be established by this Board.

In Cape Breton Development Corporation, *supra*, the Board stated:

"It is well established by now that section 119 provides the Board with an independent plenary power to review, rescind, amend, alter or vary any order or decision which it previously made. This power can be triggered by an application from a party affected by the order or decision, or it can be used by the Board on its own motion. The recognition of this independent

plenary power can be found in Labour Relations Board of the province of British Columbia et al. v Oliver Co-Operative Growers Exchange, [1963] S.C.R. 7; (1962), 40 W.W.R. 33; and 62 CLLC 15,428; Canada Labour Relations Board v. National Association of Broadcast Employees and Technicians, [1980] 1 F.C. 720; Canadian Broadcasting Corporation v. Canada Labour Relations Board, no. A-467-82, January 22, 1985 (F.C.A.); and Union des Artistes v. Canadian Union of Public Employees et al., no. A-725-82, January 22, 1985 (F.C.A.)

The Board has expressed how it would use its powers under section 119 in Canadian National (1975), 9 di 20; [1975] 1 Can LRBR 327; and 75 CLLC 16,158 (CLRB no. 41); British Columbia Telephone Company (1979), 38 di 124; [1980] 1 Can LRBR 340; and 80 CLLC 16,008 (CLRB no. 220); Teleqlobe Canada (1979), 32 di 270; [1979] 3 Can LRBR 86; and 80 CLLC 16,025 (partial report) (CLRB no. 198); Wardair Canada (1975) Ltd. (183), 53 di 184; and 84 CLLC 16,005 (CLRB no. 434); Brewster Transport Company Limited (1986), 66 di 133; and 86 CLLC 16,045 (CLRB no. 580); and Curragh Resources and Altus Construction Services Ltd. (1987), 70 di 186; 18 CLRB (NS) 233; and 87 CLLC 16,034 (CLRB no. 640). In those decisions the Board set out at some length how and when it would act in given circumstances. One thing that becomes abundantly clear from those decisions is that the Board views its role vis-à-vis bargaining unit determination as an ongoing role and it encourages parties to certification orders to come to the Board under section 119 when circumstances warrant variances to bargaining unit descriptions."

(pages 93-94; 233-234; and 14,031)

And further, in the same decision:

"It stands to reason then that if the Board is reviewing previous decisions or orders, which the Board is doing here, the powers that the Board had when it made those decisions or issued the orders must surely be reinstated in full when a review is taking place under section 119."

(pages 95; 235; and 14,031)

And finally, we will quote a last excerpt of that decision:

"This now completes the review and consolidation of the horizontal scope of the bargaining units at Devco's Coal Division. Rather than having to deal with 12 separate bargaining units, Devco now has 4 bargaining units. The Board will now turn its mind to the vertical scope of these four bargaining units to review all of the classifications that are excluded on the grounds that the incumbents perform managerial functions or are employed in a confidential capacity in matters relating to industrial relations. To this end, the Board has directed Devco to supply lists of these classifications with job descriptions to the Board and

to the four bargaining agents. The parties are to meet with Mr. John Vines, the Board's Regional Director, to discuss these exclusions and attempt to resolve the more obvious exclusions. Mr. Vines will then investigate the other exclusions and file a complete report to this Board with a copy to the parties who shall then have an opportunity to make any additional submissions to the Board. At that time, the Board will decide whether further hearings will be necessary."

(pages 99; 239; and 14,034)

In Canada Post Corporation, supra, the Board stated:

"As a final introductory comment to this section, it is incumbent to us to state that the approach that we have taken with regard to the instant case is that we view the parties as coming before the Board seeking initial certifications. As expressed earlier in these reasons, this Board has never had the opportunity to look at the bargaining unit configuration of the Corporation as it was initially established within the specific and particular context of the Public Service of Canada. Those needs and the manner in which bargaining units were established bear little, if any, relationship to the manner in which bargaining units were configured pursuant to the Canada Labour Code. This is not to say that history has no relevance. On the contrary, the Board has looked very carefully at and has considered the historical relationship between the various bargaining agents and the Corporation, the initial recommendations of the Preparatory Committee on Collective Bargaining and the reasons why the PSSRB certified the units it did."

(pages 92-93; and 155-156; emphasis added)

Further it went on to say:

"With regard to the 'upward' delineation of this particular bargaining unit, the Board is not certain on the basis of the evidence heard during Phase I whether it should be at grade 6, 7 or 8. This matter will be addressed in Phase II. ..."

(pages 95; and 158)

These quotes exhibit new interpretation policies that this Board has recently established to deal with this new breed of review applications by employers desirous to realign complex or obsolete bargaining structures they have to deal with.

The Board then views the parties as coming before the Board seeking initial certification. Therefore section 27 of the Code applies. Section 27(1) gives the Board power to determine if the bargaining unit(s) proposed is (are) appropriate for collective bargaining and section 27(2) allows the Board to include any employees in or to exclude any employees from the bargaining unit(s) proposed. That is, employees who are not to be included by the Board because they belong to management or have functions which are confidential in matters of labour relations.

The utilization of section 18 triggers the plenary powers with which the Board is vested under this section and which have been confirmed by the Courts as appears in one of the quotes above.

In basing its preliminary objection to the instant cases of review by the CBRT and GW, which were an aftermath of its own review application which entailed new bargaining units, on a decision of the Board in British Columbia Telephone Company (140), supra, the application of which was severely restricted by Teleqlobe Canada, supra, Marine Atlantic was therefore, so to speak, barking up the wrong tree.

In these types of applications the Board will apply its criteria of appropriateness, take into account the timing of the application, will verify the representative character of the bargaining agent(s) involved in the new bargaining unit it determines to be appropriate. This

representative character, usually ascertained in such circumstances by votes, will be in the overall new bargaining unit. If the new appropriate bargaining unit happens to include employees not hitherto represented by existing bargaining agent(s) they may indeed be "swept in" against their wish and the Board has the plenary power to include any employee in the proposed bargaining unit either at the time of the review application of the employer or at a later date upon an application for review by a bargaining agent which has just been certified in a new bargaining unit determined to be appropriate by the Board.

It would have been preferable in the case of the application for review by Marine Atlantic if the Board had had the time to hear the evidence and representations of the parties as regards what was to become the subject of the review applications now under study. But this situation is not new in applications of that type. It will have been noted that in both Cape Breton Development Corporation, supra, and Canada Post Corporation, supra, the Board was confronted with somewhat the same problem. In the first one, the Board ordered a further investigation while issuing its review order and consolidation of the "horizontal scope" of four new bargaining units. It added that upon receiving the report of this additional investigation, it would decide whether further hearings would be required concerning the "vertical scope" of the new units. In the second one, the Board issued its decision on the review and consolidation of new bargaining units and decided to resort to public hearings as regards the "upward" delineation of one particular bargaining unit.

The Board has already explained the superior labour relations reasons which made it handle the situation it was confronted with the way it did in the case of the two new bargaining units now involving CBRT and GW following upon the representation ballots which it won.

The Board therefore is not denying the instant review applications on the basis of the preliminary objection raised by Marine Atlantic.

It therefore proceeded with an investigation of these two applications, received a detailed report by one of its officers, the same which was forwarded to the parties, received the evidence thereby gathered, analyzed the written representations of the parties and decided that no hearings would be required.

It now has to decide the merit of these applications for review by the CBRT and GW.

The position of Marine Atlantic is threefold:

1. The classifications of the employees sought to be included by the applicant union have always been purposely, deliberately and consciously excluded by the predecessor to this Board from a number of scopes of bargaining unit descriptions issued by said Board.
2. These employees are management employees and/or exercise functions confidential in industrial

relations and are therefore not employees within the meaning of the Code.

3. The positions sought would be inappropriate for inclusion by reason of lack of community of interest.

The position of CBRT and GW is as follows:

1. All employees of the unlicensed group under agreements 1.1, 1.4, 1.6 and 7.1 have been regrouped in the same bargaining unit effective June 30, 1989. CBRT and GW is therefore now certified for senior chief cooks in the Newfoundland Service (former agreement 1.1) and also the P.E.I. Service (former agreement 1.6) and certified to represent the classification of chief cook (formerly under agreement 1.1).

It makes no sense for some employees in these classifications to be in the bargaining unit and some others to be excluded just because they are in different Services since they perform identical duties and have identical responsibilities.

2. All employees in the licensed group under former agreements 1.2, 1.5, 1.7, 1.9 and 6.1 have been regrouped in the same bargaining unit effective June 30, 1989. The Union recognizes that prior to June 30, 1989, they were the bargaining agent for the chief stewards, pursers, assistant

pursers only in the Newfoundland Service (former collective agreement 1.2).

It makes no sense for some employees in these classifications to be in the bargaining unit and some others, performing in different Services with identical duties and responsibilities, to be excluded.

The suggestion by the employer that the securing of bargaining rights over those employees should only be done by way of an application for certification would appear to mean that there would be some of these classifications and their incumbents in the existing certified (since June 30, 1989) bargaining unit and the other completely identical classifications in another separate certified bargaining unit.

The position of the intervenors is as follows. As we stated above, there are sixteen incumbents of classifications which are claimed by the CBRT and GW.

As regards the unlicensed positions (2) in the classification of chief cook, both incumbents forwarded a letter to the Board jointly with incumbents of the licensed classifications claimed by the CBRT and GW, wherein they expressed the wish not to be represented by that union or any union.

As regards the licensed positions (14), 7 of the incumbents, in the same joint letter just mentioned, also

expressed the wish not to be represented by the CBRT and GW or any union. They are, together with the two chief cooks, all employed in the Yarmouth - Bar Harbour Service. Five are pursers and two are chief stewards.

Four of the incumbents wrote to the Board, asked for the status of intervenors, were granted it and obtained all correspondance and written representations of the parties and they also obtained copies of the report of the Board's investigator. Three are pursers in the Digby - Saint-John Service and one is a senior purser also in that service.

Three of the incumbents in the licensed positions being sought, did not react to the application.

None of the sixteen incumbents asked for a hearing.

In such circumstances, the Board, as a policy, keeps in confidentiality the letters it receives from individual employees, if they only express a wish to be included or excluded. It did so in the instant case concerning the joint letter referred to above which was signed by nine of the incumbents (2 unlicensed - 7 licensed).

However, upon receipt of the report of the investigator of the Board, Marine Atlantic did make representations upon it as it is entitled to, like all other parties. In these representations it stated:

"Your item 12 indicates that certain submissions have not been reproduced because they contain expression of wishes only; allow me to dispute this judgment. I am, for instance, aware of a letter dated September 19, 1989, signed by a number of persons who state their wish to remain 'management employees'. That is not only a wish, it is also a statement of fact, and

significantly goes to both issues of managerial and appropriateness, including community of interest."

Individual employees who write to the Board, expressing a wish, are told of the policy of the Board to keep that information confidential, unless said employees instruct the Board otherwise. The Board will therefore not reproduce that letter, even though it would appear from the above that one or some of them did not heed the policy of the Board.

However, since Marine Atlantic is raising as one of its reasons for objecting to the Board granting the application, the fact that these employees would perform management duties, the Board ordered a thorough analysis of the duties of all of the incumbents of the classifications claimed.

Turning to the four intervenors, their position is twofold:

1. They all allege that they exercise functions of supervision and/or of management and some claim that their functions are confidential in matters of industrial relations.
2. They all express the fear, if included in the bargaining units, to lose superior benefits granted to them as "non-scheduled" employees of the employer as compared to the working conditions of the employees in the same classifications as theirs but who are covered by the ambit of collective bargaining.

Here are the four expressions of these fears:

"And last but not the least is our present benefit package. The pay may be close to the same as a Unionized Purser, however, we have a lot of different benefits, in my opinion the one we have now is far superior to the one the Union offer. Since coming to work on this Vessel in 1975, I have been in a Non-Union position with the benefit package that goes along with it, and I have based my lifestyle around these benefits, ie life insurance policies, mortgage insurances, etc., and it would be a 'demotion', in my view to be transferred to the Union ranks."

"And last but not the least is our present benefit package. The pay may be close to the same as a unionized Purser, however we have a lot of different benefits in my opinion the one we have now is far superior to the one the union offer. Since coming to work on the vessel as Purser in 1980, I have been in a Non-Union position with the benefit package that goes along with it, and I have based my lifestyle round these benefits ie life insurance policies, mortgage insurance etc. and it would be a 'demotion' in my view, to be transferred to the union ranks."

"I am also very concerned about the loss of the management benefit package that I have enjoyed for the past 14 years such as paid sick time and a large life insurance policy for protection of my family in my death as well as disability benefits etc. etc. which I know is far better than what the union has to offer. I am very satisfied with what Marine Atlantic provides for non-schedule supervisors and feel the loss would be like going back 15 years and starting all over again."

The C.B.R.T. has nothing to offer me in my present position that I do not already have more of and by taking me in they will subject me and my family to a needless loss of benefits. Perhaps that is why they did not bother to even ask us if we would like to be represented by them."

"Since being promoted from a union position to a non-union position in 1977, I have based my life style around the benefit package included with the change in jobs. Financial decisions, turning down a further promotion three years ago, are a couple of choices I made thinking my present job would remain secure as is."

The Pursers of this particular service, myself included, are quite satisfied with the working conditions and benefit package that Marine Atlantic Inc. presently provides for us, in comparison to becoming unionized, which I/we feel would be a demotion."

The Board has come to the conclusion that the classification of senior purser in the Digby - Saint John Service should not be included in the licensed bargaining unit. There is enough evidence in the job content of that position to conclude that it belongs to management.

As regards the shore purser, the Board concluded that it also should be excluded, but not for the same reason. The description of the job makes it far more an administrative and clerical position than that held by the other pursers in all services. Therefore, the community of interest with the rest of the incumbents of purser positions is lacking. It does not belong to this Board to advise an employer as to how it should administer its personnel policies but it appears to us that it would be rather easy to clearly define the functions of that incumbent in the clerical and administrative department of the employer.

As regards the rest of the classifications sought by this application, the Board came to the conclusion that they are all to be included in the two respective bargaining units of unlicensed personnel (2 chief cooks) and, licensed personnel (4 chief stewards: 2 in the Yarmouth - Bar Harbour and 2 in the P.E.I. - New Brunswick Service; 6 pursers; 2 in the Yarmouth - Bar Harbour Service and 4 in the Digby - Saint John Service; and 2 assistant pursers in the Yarmouth - Bar Harbour Service).

A close scrutiny of the job descriptions of these positions does not establish functions which are confidential in matters of industrial relations warranting, on the basis of the criteria observed by this Board, exclusion from a

bargaining unit. Nor did we find that these were positions where the incumbents are performing management functions again, on the basis of criteria observed by this Board.

The Board wishes to remind the incumbents of the fourteen positions now to be included in the two bargaining units that belonging to the non-scheduled category of employees of Marine Atlantic does not necessarily equate belonging to the management ranks.

Conversely we found that there is community of interest between the chief stewards, pursers and assistant pursers in the Yarmouth - Bar Harbour Service, the Prince Edward Island - New Brunswick Service, the Digby - Saint John Service and the chief stewards, pursers and assistant pursers in the Newfoundland Service, who for years, have been recognized by the predecessors to this employer, as exercising functions capable of constituting an appropriate bargaining unit.

As regards the interveners who have now been included by the instant determination of the Board, the latter noted that one of their chief objections, if not the chief one, was the fear of losing some superior benefits which they have enjoyed for a number of years over the conditions of work of employees in the same classifications covered by collective bargaining.

In Canadian National Railways (1982), 44 di 170; [1982] 3 Can LRBR 384; and 82 CLLC 16,197 (CLRB no. 387), the Board was facing a somewhat similar situation and it wrote:

"As discussed, non-scheduled employees enjoy benefits which are, in certain cases, superior to those enjoyed by scheduled employees covered by collective agreements as well as in some cases slightly higher wages. It would be manifestly unfair to deprive these employees of those benefits and wages, given by the employer for whatever reason, as the price of becoming unionized, particularly as the overwhelming majority of them have expressed serious reservations, if not total opposition, at the prospect. It is thus the direction of the Board that these benefits and wages currently enjoyed by non-scheduled employees, which are superior to those of scheduled employees, be maintained until such time as negotiated benefits equal or exceed them."

(pages 214; 416; and 930)

The Board orders, in the instant case, that the same policy apply to any employee similarly affected by the Board's order. All superior wages or benefits enjoyed by any employee whose position is now included by this decision in the bargaining units shall be maintained until such time as negotiated wages or benefits exceed them.

The inclusions of 2 employees in the bargaining unit of unlicensed personnel and of 12 employees in the bargaining unit of licensed personnel do not affect the overall majority or representation character of CBRT and GW in either bargaining unit.

Accordingly the Board is issuing today the annexed order certifying the CBRT and GW as the certified bargaining agent for a unit of licensed personnel comprising:

"All licensed personnel aboard all vessels owned or operated by Marine Atlantic Inc., previously covered by collective agreements 1.2, 1.3, 1.5, 1.7, 1.9 and 6.1 and also including all chief stewards, pursers and assistant pursers but excluding senior pursers in the Digby - Saint John Service and shore purser, in Yarmouth, Nova Scotia."

(This is file 530-1762.)

Accordingly also, the Board is issuing today the annexed order certifying the CBRT and GW as the certified bargaining agent for a unit comprising:

"All unlicensed personnel aboard all vessels owned or operated by Marine Atlantic Inc., previously covered by collective agreements 1.1, 1.4, 1.6 and 7.1 and also including all chief cooks."

(This is file 530-1763.)

VII

This decision of the Board deals with outstanding bones of contention between the CBRT and GW and Marine Atlantic regarding the scope of the two new very large appropriate bargaining units which the application for review by the employer generated.

It also wipes away a lot of cobwebs which subsisted because of the inheritance left by the railway industry to Marine Atlantic Inc.

However, it leaves some of them which should eventually also be wiped away.

The Board is aware that Marine Atlantic and the CBRT and GW are currently engaged in collective bargaining for the negotiation of two (2) collective agreements for the two (2) units of licensed and unlicensed personnel respectively. It is also aware that the employer and the Brotherhood of Maintenance of Way Employees have ratified and implemented a memorandum of agreement for a new

collective agreement covering the plant maintenance employee's unit. Finally, it is also aware that the employer and the TCU/ILA Council of Trade Unions have ratified and implemented a memorandum of agreement for a new collective agreement covering the shore-based terminal and clerical unit.

In the case of both the plant maintenance and the terminal and clerical units, the parties, in dealing with the problems to which the Board referred at pages 46 and 47 of these reasons, have apparently agreed that the language of the old collective agreements applying to the old bargaining units will be consolidated during the life of the new collective agreements. In the case of all four (units) it is apparently being proposed that the four (4) eventual new collective agreements will no longer be numbered but will be referred to as:

- Agreement A - Licensed unit,
- Agreement B - Unlicensed unit,
- Agreement C - Plant maintenance,
- Agreement D - Terminal and clerical.

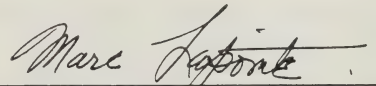
The actual wording of these four new collective agreements not having been finalized, it would be premature and also presumptuous of the Board to issue certification orders containing descriptions of the bargaining units really brought to date by referring to units of employees covered by agreements A or B or C or D.

The fact remains that at the moment there are four descriptions of bargaining units which refer to bygone days and are very unsatisfactory in the view of the Board.

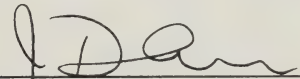
When the employer and the four bargaining agents finalize the wording of the four (4) new collective agreements, the Board would be pleased to entertain applications by the parties to update the description of these units to reflect the modern reality.

In concluding, the Board prays that the parties, in the future, become alert to monitoring the evolution of these bargaining unit descriptions.

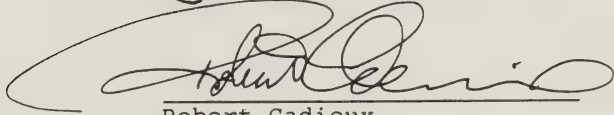
This is a unanimous decision.



Marc Lapointe, Q.C.
Chairman of the panel



James Abson
Member of the Board



Robert Cadieux
Member of the Board

DATED at Ottawa this 14th day of September, 1990

information

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Summary

GARRY LLOYD AGER, COMPLAINANT; UNITED
TRANSPORTATION UNION, AND BROTHERHOOD
OF LOCOMOTIVE ENGINEERS, RESPONDENTS;
AND CANADIAN NATIONAL RAILWAY COMPANY,
EMPLOYER.

Board File: 745-3692

Decision No.: 823

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Résumé de Décision

GARRY LLOYD AGER, PLAIGNANT; LES
TRAVAILLEURS UNIS DES TRANSPORTS, ET
LA FRATERNITÉ DES INGÉNIEURS DE
LOCOMOTIVES, INTIMÉS; ET LA COMPAGNIE
DES CHEMINS DE FER NATIONAUX DU
CANADA, EMPLOYEUR.

Dossier du Conseil: 745-3692

N° de Décision: 823

These reasons deal with a complaint
under section 37 of the Code arising
from allegations of arbitrary and bad
faith conduct on the part of two trade
unions in their representations before
this Board during unlawful strike
proceedings in November 1989.

While the Board raised doubts about
whether the grounds for the complaint
could properly be considered as
falling within the ambit of the duty
of fair representation under the Code,
this question was not answered as the
complaint was dismissed as being
untimely in that it was filed after
the expiry of the 90-day time limit
permitted in section 97(2) of the
Code.

Les présents motifs concernent une
plainte déposée en vertu de l'article
37 du Code dans laquelle il est
allégué que deux syndicats ont agi de
façon arbitraire et de mauvaise foi
dans les arguments qu'ils ont
présentés devant le Conseil en
novembre 1989 au cours d'une procédure
concernant une grève illégale.

Le Conseil s'est demandé si les motifs
de la plainte pouvaient être
considérés comme des motifs relevant
du devoir de représentation juste visé
par le Code, mais cette question est
restée sans réponse puisque la
plainte, ayant été déposée après
l'expiration du délai de 90 jours
prévu par le paragraphe 97(2) du Code,
a été jugée irrecevable.



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Reasons for decision

Garry Lloyd Ager,
complainant,
United Transportation Union,
and
Brotherhood of Locomotive
Engineers,
respondents,
and
Canadian National Railway
Company,
employer.

Board File: 745-3692

The Board was composed of Vice-Chairman Hugh R. Jamieson and Members Calvin B. Davis and Michael Eayrs.

The reasons for this decision were written by Vice-Chairman Hugh R. Jamieson.

Appearances (on record):

Garry Lloyd Ager, for himself;
Leanne M. Chahley, for the United Transportation Union;
James L. Shields, for the Brotherhood of Locomotive Engineers; and
Keith G. Macdonald, for the Canadian National Railway Company.

These reasons deal with a complaint under section 37 of the Canada Labour Code (Part I - Industrial Relations) which was filed with the Board by Mr. Garry Lloyd Ager (the complainant) on July 3, 1990.

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

The circumstances giving rise to the complaint occurred between November 10 and November 29, 1989 when the two respondent unions were involved in proceedings before this Board relating to an unlawful strike application which had been initiated by Canadian National Railway Company (CNR or the employer). The outcome of those proceedings was a finding by the Board that both the United Transportation Union (UTU) and the Brotherhood of Locomotive Engineers (BLE) had authorized or declared an unlawful strike and that the unions' members were participating in the unlawful activities. The Board issued an order requiring both unions and their members to cease and desist from continuing their unlawful strike. See Canadian National Railway Company (1989), 90 CLLC 16,010 (CLRB no. 770). In this complaint Mr. Ager makes the following allegations against the UTU and BLE:

"The complainant alleges that the United Transportation Union and the Brotherhood of Locomotive Engineers:

- 1. Acted in an 'arbitrary manner' and in 'bad faith' in agreeing to the issuance of the Board Order of November 14, 1989 in the absence of the essential facts.*
- 2. Acted 'arbitrarily' and in 'bad faith' in agreeing to the issuance of the Board Order of November 14, 1989 which contained ambiguous language.*
- 3. Acted 'arbitrarily' and in 'bad faith' in failing to follow through with the preliminary motion raised to dismiss the Company's second application contained in Board File No.: 530-1784.*

4. Acted 'arbitrarily' and in 'bad faith' in failing to follow through with the preliminary objection raised by Counsel for the United Transportation Union in regards to the doctrine of 'res judicata' and the allegation of abuse of the Board's processes.
5. Acted 'arbitrarily' and in 'bad faith' in ignoring evidence which was intended to be introduced by the Local Committees of Adjustment of Local 701 of the United Transportation Union and Division 945 of the Brotherhood of Locomotive Engineers.
6. Acted 'arbitrarily' and in 'bad faith' by ignoring their obligation to be candid and honest in advising the members of Local 701 and Division 945 so they are not led to believe that they are having their 'day in court' when in fact, they are not.
7. Acted 'arbitrarily' and in 'bad faith' in failing to appeal the decision of the Board under Section 28(1)(a) of the Federal Court Act."

(page 5 of the complaint, item #18)

In response to the complaint, the UTU and the BLE addressed the timeliness of the complaint. Both unions submitted preliminary motions that the Board has no jurisdiction to entertain the complaint as it is clearly untimely on its face in light of the 90-day time restriction contained in section 97(2) of the Code:

"97.(2) Subject to subsections (3) to (5), a complaint pursuant to subsection (1) shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint."

The UTU and the BLE requested that the complaint be dismissed without a hearing on the basis of its untimeliness; however, they reserved their right to address the merit of the complaint should the Board decide to proceed with it.

By way of a written submission dated August 20, 1990 the complainant replied to the preliminary motions of the UTU and BLE on the timeliness of his complaint. Essentially what the complainant relies upon to bring his complaint within the 90-day time limit is item #17 on page 5 of his original complaint where he wrote:

"An examination of the facts prior to and on June 21, 1990 led the complainant to the unmistakable conclusion that an 'unfair labour practice' complaint should be filed against the Canadian National Officers of the United Transportation Union and the Brotherhood of Locomotive Engineers."

In his August 20 submission the complainant went on to explain that it was only upon reading a transcript of the 1989 unlawful strike proceedings on or about June 21, 1990 that he became aware of the facts and circumstances giving rise to his complaint.

In addition to the question of timeliness the complainant touched upon many other topics in his August 20 submission including the perceived bias of the Board. The complainant also requested that the timeliness and the merits of his complaint be referred to the Federal Court of Appeal pursuant to section 28(4) of the Federal Court Act.

On September 11, 1990 this quorum of the Board considered the submissions of the parties in light of the preliminary motions about the timeliness of the complaint. The Board used its powers under section 98(2) of the Code to dispose of this section 37 complaint without a public hearing.

"98.(2) The Board may refuse to hold a public hearing on a complaint made in respect of an alleged contravention of section 37 or non-compliance with section 69 if, in the opinion of the Board, such a hearing would not be consistent with the objectives of this Part."

II

We have already reproduced section 97(2) in these reasons and, for the sake of clarity we should also quote section 16(m) of the Code to which we shall be referring:

"16. The Board has, in relation to any proceeding before it, power

...

(m) to abridge or enlarge the time for instituting the proceeding or for doing any act, filing any document or presenting any evidence in connection with the proceeding;"

This whole question of timeliness of complaints and the Board's lack of authority to extend the 90-day limit for filing complaints is well settled. In Upper Lakes Shipping Ltd. v. Mike Sheehan et al. [1979] 1 S.C.R. 902, the Supreme Court of Canada ruled that the Board has no powers to extend the time limits in section 97(2) notwithstanding the wording of section 16(m). Once the 90-day time limits in 97(2) expire, a complaint is defunct and it cannot be revived by circumstances arising at a later date.

The Supreme Court of Canada said the following at pages 914-915:

"There is one further point that requires consideration, and that is the Canada Labour Relations Board's reference to its power under s. 118(m) (now s. 16(m)) of the Labour Code which authorizes the Board, in relation to any proceeding before it, *inter alia*, to enlarge the time for instituting the proceeding. In its reasons, the Board took note of this power in the following words:

'Although the Board is also of the opinion that paragraph 118(m) of the Code does empower it to enlarge the time for filing complaints, this paragraph cannot be read as allowing the Board to accept complaints based on a situation which arose before the coming into effect of the relevant sections of the Code, *i.e.*, prior to March 1, 1973.'

The Board appears to be saying that because Sheehan's complaint was based on circumstances which arose when the employer could lawfully refuse employment to him under a closed or union shop clause, s. 118(m) could not be invoked by it after March 1, 1973 to enable Sheehan to turn lawful action into unlawful action. I do not share this view, but I am of the opinion that s. 118(m) is not applicable for another and more fundamental reason, namely, that it does not empower the Board to alter a substantive provision of the statute prescribing a time limit for filing complaints.

Section 118(m) is as follows:

'118. The Board has, in relation to any proceeding before it, power
...
(m) to abridge or enlarge the time for instituting the proceedings or for doing any act, filing any document or presenting any evidence in connection with the proceeding.'

I read this provision as empowering the Board to abridge or enlarge the time for taking steps in a proceeding which is properly before it, as, for example, a certification proceeding. If, however, the issue is whether a proceeding is timely under the Board's governing statute, that is, whether the Board can lawfully entertain it at all in the light of s. 187(2) (now s. 97(2)), I do not regard its powers under s. 118(m) as entitling it to give latitude to a complainant who is out

of time under the statute. The correlative would be that it it can enlarge it can abridge, and that would be absurd. A complainant is entitled to the advantage and is subject to the limitation of the ninety day period under s. 187(2). It can neither be restricted to a lesser period by any direction of the Board nor be allowed a greater period."

(emphasis added)

We have grave doubts if the grounds for the allegations against the UTU and BLE which go to the manner in which counsel handled the unions' cases before this Board in unlawful strike proceedings could be considered to be conduct which affects the rights of employees in the bargaining units with respect to their rights under the collective agreement that is applicable to them which is a prerequisite for a complaint under section 37 of the Code. However, without deciding that question, for the purposes of section 97(2), the circumstances complained of took place during a well defined time period which ended on November 29, 1989 when the Board issued its cease and desist order. The only allegation going to circumstances after that date is the allegation in no. 7 of the complaint about the failure of the UTU and BLE to seek a review of the Board's order in the Federal Court of Appeal. The unions would have had ten days after the issuance of the order to commence proceedings under section 28 of the Federal Court Act. This complaint was not filed until some seven months later.

While the time of the occurrences is obviously important, the thrust of section 97(2) goes to the time that the complainant knew or ought to have known of the circumstances giving rise to the complaint. Here, we are satisfied that the complainant knew or ought to have known about the grounds for his complaint well before the 90 days preceding

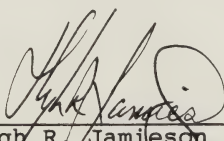
July 3, 1990 when his complaint was filed. By his own admission in the complaint, Mr. Ager attended the hearings before the Board in November 1989 and he was aware of the Board's order the same day it was issued. The Board's reasons for decision came to his attention on or about January 2, 1990, according to his submissions in his complaint. The next day, January 3, 1990 Mr. Ager initiated proceedings in the Federal Court of Appeal to have the Board's decision set aside. It is our opinion that at that time, he knew or ought to have known about the circumstances about which he now complains. He certainly knew about how the unions conducted themselves before the Board as he was present each day of the hearings. Further, he ought to have known that neither union had initiated review proceedings in the Federal Court of Appeal during the ten day time period after the order was issued. If they had, he surely would not have duplicated the process with his own proceedings on January 3, 1990.

Taking everything into account and, giving Mr. Ager the benefit of as much doubt as we can, it is the Board's finding that for the purposes of section 97(2) of the Code, the 90-day period for filing a complaint on the grounds set out in this complaint would have commenced no later than January 3, 1990. To be timely the complaint should have been filed no later than April 4, 1990. We certainly cannot accept the complainant's suggestion that because he read a transcript of the proceedings some time in June 1990 and decided to take action against the unions that the time limits are somehow re-opened. The complaint is untimely and it is dismissed accordingly. Having so decided there is no need to address the more fundamental question of whether the grounds for the complaint fall within the ambit of the duty of fair representation under section 37 of the Code.

III

One further item before closing. In Mr. Ager's submissions he refers to a segment of his complaint wherein he asks the Board to exercise its powers under section 18 of the Code to reconsider and to vary the wording of the order of November 29, 1989. We have read this as a remedy sought in his complaint. It follows that this request for a remedy falls by the wayside upon the dismissal of the complaint. If we are wrong and Mr. Ager really intended to file a separate application for review he is of course free to do so. However, we would like to caution Mr. Ager about the timeliness of such an application some ten months or so after the decision was issued. Further, there would be a heavy onus on Mr. Ager to show that he is a party entitled to file such an application and, even if he is, there would have to be some extremely serious and compelling reasons before the Board would consider any application to vary the order in question.


The foregoing is a unanimous decision of the Board.



Hugh R. Jamieson
Vice-Chairman



Calvin B. Davis
Member



Michael Eayrs
Member

DATED at Ottawa this 24th day of September, 1990.

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Résumé de Décision

ADRIEN MATHON, REQUÉRANT, LE SYNDICAT DES DÉBARDEURS, SECTION LOCALE 375 DU SYNDICAT CANADIEN DE LA FONCTION PUBLIQUE, SYNDICAT, LOGISTEC STEVEDORING INC./ASSOCIATION DES EMPLOYEURS MARITIMES, EMPLOYEUR INTIMÉ, ET RICHARD ROBERT, AGENT DE SÉCURITÉ DE TRAVAIL CANADA.

Dossier du Conseil: 950-152

N° de Décision: 824

Il s'agit d'une demande de révision, en vertu du paragraphe 129(5), d'une décision d'un agent de sécurité qui, après avoir mené une enquête et considéré de nouveaux faits, a conclu à l'inexistence d'un danger à la suite d'un refus de travailler.

Il a été question également du délai de sept jours prévu au paragraphe 129(5) et de la prétention que le Conseil se trouvait en présence de deux décisions.

Le Conseil a déterminé qu'il était en présence d'une décision qui avait été rendue au terme de l'enquête, a rejeté l'objection sur le délai, a confirmé la décision de l'agent et a rappelé différents principes sur l'application de la Partie II du Code.

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Summary

ADRIEN MATHON, APPLICANT, THE SYNDICAT DES DÉBARDEURS, LOCAL 375 OF THE CANADIAN UNION OF PUBLIC EMPLOYEES, UNION, LOGISTEC STEVEDORING INC./MARITIME EMPLOYERS' ASSOCIATION, RESPONDENT EMPLOYER, AND RICHARD ROBERT, LABOUR CANADA SAFETY OFFICER.

Board File: 950-152

Decision no. 824

This case deals with an application filed pursuant to section 129(5) to review a decision of a safety officer who, after investigating the matter and considering new facts, concluded that no danger existed when the employee refused to work.

The seven-day time limit provided in section 129(5) and the claim that the Board was faced with two decisions were discussed.

The Board determined that the safety officer had issued one decision upon completion of his investigation; it dismissed the objection concerning the time limit, upheld the officer's decision and reiterated the various principles dealing with the application of Part II of the Code.



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Reasons for decision

Adrien Mathon,

applicant,

and

Syndicat des débardeurs,
Local 1-375 of the
Canadian Union of Public
Employees (CLC),

union,

and

Logistec Stevedoring Inc.
and Maritime Employers'
Association,

respondent employer,

Richard Robert - Labour
Canada,

safety officer.

Board File: 950-152

The Board was composed of Mr. J. Jacques Alary, sitting as a single-member panel pursuant to section 156(1) of the Canada Labour Code (Part II - Occupational Safety and Health).

Appearances:

Mr. John A. Coleman, for Logistec Stevedoring Inc. and the Maritime Employers' Association; and

Mr. Bernard Paquet, for the complainant and the Syndicat des débardeurs, Local 1-375.

I

The remedy

This case is further to the reference of a decision issued by safety officer Richard Robert to the Canada Labour Relations Board, pursuant to section 129(5) of the Code, at the request of Adrien Mathon, an employee of Logistec Stevedoring Inc. (Logistec).

Mr. Mathon is asking the Board to review the decision of safety officer Robert who, after conducting an investigation and considering new facts, concluded that no danger existed following Mr. Mathon's refusal to work on March 29, 1990.

At the hearing held in Montréal on September 4 and 5, 1990, counsel for the employer raised a preliminary objection, arguing that the seven-day time limit provided by section 129(5) had not been observed in this case. The employee's representative, for his part, raised a preliminary objection to the effect that on March 29, 1990, the safety officer issued a decision in which he concluded there was danger and that he did not have the authority to reverse this decision. The representative argued that there are two decisions in this case: the decision of March 29, 1990 and the decision of April 20, 1990. If the Board determined that on March 29, 1990, the safety officer in fact issued a decision in which he concluded that there was danger, it should declare that it has no jurisdiction in this matter. It was agreed that the Board would hear the evidence concerning the preliminary objections and the merits before dealing with these objections.

II

The facts

On March 29, 1990, Mr. Mathon, who has been a longshoreman in the port of Montréal for 30 years, was assigned to operate lift truck no. 1121 at Logistec. His work consisted in lifting asbestos pallets in shed 50 with a lift truck and transporting them to the vessel loading dock where another operator was loading them aboard the M/V MIZORAM.

From the beginning of his shift until the morning break, Mr. Mathon transported one asbestos pallet at a time to the vessel loading area, using his lift truck. At the break, his foreman, after discussing this transporting operation with his superiors, asked Mr. Mathon to move two asbestos pallets at a time instead of one. Mr. Mathon refused because transporting two pallets required him to drive in reverse over too long a distance, and Mr. Mathon considered this a danger to his safety and health. Following this refusal, employer representative Robert Paquette arrived at the work site to discuss the matter. Following a short discussion and Mr. Mathon's continued refusal to work, the parties set in motion the procedure provided for in the Code in this situation. Labour Canada was contacted without delay and it sent safety officer Richard Robert to the work site to conduct an investigation.

Upon his arrival, Mr. Robert went to Logistec's administration office where he met with the applicant, Robert Paquette, Jacques Auclair, co-ordinator of the Maritime Employers' Association who telephoned Labour Canada on behalf of the parties, Alain Lefebvre and Jean Faucher of Logistec, and André L'Allier, union representative. Richard Sicotte, a representative of Hewitt Equipment, joined the group a little later, at Mr. Lefebvre's request.

Discussions took place between those present at this meeting which ended with the issuing on site of a handwritten decision containing the following text under the section dealing with the reason for the refusal:

"Obligated to drive a lifter in reverse the full length of the shed. This strains his neck and he inhales propane exhaust."

(translation)

The description of the facts contains the following text:

"In transporting two pallets instead of one, forward visibility is reduced. The exhaust makes one sick and this is hard on the neck and spinal column."

(translation)

The description of the facts by the employer contains the following statement:

"The work has always been done by driving in reverse when necessary."

(translation)

Under the heading Decision, there is the following text:

"DECISION

I conclude that there is danger because

(1) the employee works with his neck turned to the maximum and vibration from the lifter may injure him;

(2) visibility is reduced;

(3) the operator's manual for the propane-fuelled lifter does not specify that the lifter can be driven in reverse over long distances (danger of inhaling exhaust);

(4) there may be emissions of carbon monoxide, burned oil and other as yet unknown chemical compounds."

(translation)

On the last page are the following recommendations.

"Recommendations

(1) Check the level of carbon monoxide emitted by the lifters' exhaust.

(2) Have the level of carbon monoxide and all other contaminants that could have been inhaled by the operator checked. These contaminants are emitted by propane-fuelled engines.

(3) Ensure that vehicles are operated in the manner specified in the operator's manual. Authorized operation in reverse.

(4) Ensure that working conditions do not create other dangerous conditions (lack of visibility when driving in reverse).

(5) Ensure that a carbon monoxide measuring device is available at work site."

(translation)

This document was given to the parties at the work site during the meeting that followed the refusal. Sending Mr. Mathon to hospital for a blood test was discussed, but Mr. Mathon refused. During his testimony, Mr. Robert told the Board that he follows this procedure to protect the worker if necessary because this method enables him to make more thorough checks later. The Board reminded Mr. Robert that an employee is not required to work so long as the safety officer has not issued his final decision and that it is not therefore necessary to issue a preliminary decision which, in this case at least, only leads to confusion.

Mr. Robert also noted when he was on the employer's premises that there was asbestos dust on the ground and he asked the employer, Logistec, to clean it up, which it did.

It should be noted that no measurement of the rate of emission of carbon monoxide was made at the work site on March 29, 1990.

When he reached his office, Mr. Robert wrote certain notes on the elements of danger.

As the first element, he recorded that driving the lift truck in reverse reduces the operator's vision by 50%, that the other operators drive in reverse and also have a reduced field of vision and that there is no signaller.

As a second element of danger, he noted the exhaust emissions that the operator inhales and to which his eyes are exposed. He questioned the toxic effects of emissions from a propane-fuelled engine when these emissions are mixed with other compounds, such as burned oil and carbon monoxide emitted by an improperly adjusted engine.

He entitled the third element of danger "source of uncertainty" and questioned whether driving in reverse over a long distance is recommended in the operator's manual. He also questioned the method of operating propane-fuelled lifters.

Under the fourth element of danger, he noted the posture of the operator while driving in reverse and advanced a number of hypotheses concerning the ergonomic effects of this posture on the operator in the event of collisions which can be more frequent because of the reduced field of vision.

He concluded his notes by indicating that he had asked the employer to clean up the asbestos dust on the floor and the lift trucks and to improve the work procedure. He also stated that there had not been a meeting of the joint safety and health committee for eight months because a union co-chairman had not been named. Finally, he described the goods transported and the lift truck used.

The following day, March 30, 1990, Mr. Robert sent a handwritten facsimile to André Lachaine of the Maritime Employers' Association, with a copy to André L'Allier of the union.

The full text of this facsimile reads as follows:

" 30/03/90

MEA
André Lachaine
Fax - 866-4246
Re: Refusal to work on lift truck;
Logistec. Longshoring

André

I require information on the following two points:

1. The ergonomics of the work posture. Must one, can one require that the main direction be in reverse, which requires the operator to assume a work posture in which his neck and his back are twisted, during his entire shift?
2. Propane gas emissions from the lift trucks
 1. nature of the exhaust
 2. toxicity.

Richard Robert
Labour Canada

C.C. ILA
A. Lallier
Fax - 527-9424"

(translation)

During his testimony, Mr. L'Allier told the Board that he received this document but he did not know when, from whom or how. No transmittal sheet accompanied this document.

On April 12, 1990, Mr. Robert visited Logistec to conduct tests on carbon monoxide emissions and prepare an amended handwritten decision that he subsequently had typed. On April 20, 1990 he sent this amended decision to André Lachaine of the Maritime Employers' Association, with a copy to Adrien Mathon and André L'Allier.

Mr. Robert told the Board that he believed there was an agreement between this union and Labour Canada concerning this procedure for sending mail. He was not certain where he sent Mr. Mathon's copy, but thought that he sent it to

the union. Mr. L'Allier told the Board that he did not see this document and the above-mentioned handwritten document until on or about April 29. He told the Board that he had not contacted Mr. Mathon regarding this decision. Instead, he prepared a letter that he sent on May 9, 1990 to Pierre Rousseau, Regional Safety Officer, Labour Canada. In this letter, he requested, in accordance with section 146 of the Code, a review of the oral directions issued following Mr. Mathon's refusal and a copy, in writing, of these directions.

The following is the amended decision issued by Mr. Robert:

"Subject: Decision amended after examination of the operator's manual, consultation and investigation carried out by the employer

I. IDENTIFICATION OF THE PARTIES

*Name of employee
Adrien Mathon*

*Name of company
Logistec Stevedoring Inc. (Section 51)*

*Supervisor of employee
George Wolfe*

*Date of refusal to work
March 29, 1990*

*Location of refusal to work
Shed 50 - Port of Montréal*

*Date of telephone call to Labour Canada
March 29, 1990*

*Date of investigation by safety officer
March 29, 1990*

II. REASON FOR REFUSAL TO WORK BECAUSE OF IMMINENT DANGER

The lift truck operator is required to drive in reverse the entire length of the shed. This places strain on his neck and spinal column and he is forced to inhale propane exhaust.

III. DESCRIPTION OF THE FACTS BY THE EMPLOYEE

He breathes the exhaust from the lift truck and his neck is twisted.

IV. DESCRIPTION OF THE FACTS BY THE EMPLOYER

Driving in reverse is recommended in the operator's manual.

V. INVESTIGATION AND DECISION OF OFFICER IN ACCORDANCE WITH SECTION 125.1(6) OF PART II OF THE CANADA LABOUR CODE

1. The employer conducted its investigation and measured the level of carbon monoxide. The results were negative. There was a maximum of 10 ppm, which is below the standard of 50 ppm for STEL.
2. The posture of the operator while driving in reverse cannot be changed because the ergonomics are not regulated.
3. Driving in reverse limits the operator's vision and there is a certain danger that can be eliminated or reduced by improving the work techniques. The safety committee can examine this problem using ANSI standard B56.1-1988.
4. The employer will ensure that the lift trucks are operated in accordance with the safety recommendations and will affix INFOGRAM J01 to the LIFT TRUCKS.
5. The employer has agreed verbally, and will confirm this commitment in writing, to maintain a carbon monoxide measuring device at each work site.

In view of the new information, i.e. the measurement of the level of carbon monoxide, the recommendations in the operator's manual and the absence of regulations on ergonomics, I conclude that the risks are minimal and that no danger exists.

The reverse manoeuvre will be improved and made safe by the employer's safety committee.

Richard Robert
Safety Officer

RR/ld"

(translation)

On June 18, 1990, Mr. Rousseau replied to Mr. L'Allier. He appended to his reply a copy of a report of circumstances prepared by Mr. Robert. This report stated that no directions were issued pursuant to section 129(4) of the Code. For these reasons, Mr. Rousseau concluded that the union's request to review the directions issued on March 29

could not be considered. The complete text of the report of circumstances reads as follows:

"REPORT OF CIRCUMSTANCES"

Our File: RW-900038
Your File: 1125

Refusal to work by: Adrien Mathon
13061 Forsyth St., #202
Pointe-aux-Tremblais, Quebec
H1A 4C2

Occupation: Lift truck operator

Date of refusal to work: March 29, 1990

Location: Sections 50-51, port of Montréal

Employer: Logistec Stevedoring Inc.

Telephone calls from employer to Labour Canada: March 29, 1990 at 10:55 a.m. by Robert Paquette (MEA)

Reasons for refusal to work: Driving in reverse while transporting two pallets of bags of asbestos is dangerous.

Persons interviewed: Adrien Mathon, operator
Robert Paquette (MEA)
Alain Lefebvre, employer co-chairman
Réal Lapierre, steward
Serge Séguin, steward
Richard Dupuis, Labour Canada
Jacques Auclair (MEA)

Date of meetings: (a) March 29, 1990 (when refusal occurred)
(b) April 12, 1990 (to measure CO level)

Description of the facts by the employee

- (1) The operator has to drive in reverse because he cannot see ahead while transporting a double load.
- (2) When driving in reverse, visibility is reduced.
- (3) When driving in reverse, my neck and back are twisted.

(4) When driving in reverse, I am forced to breathe the exhaust from the propane-powered engine.

Description of the facts by the employer

(1) Driving in reverse is recommended by the manufacturer.

(2) The operator can check the movement of other lift trucks.

(3) Driving in reverse does not place any strain on the back and is only part of the work.

(4) The exhaust from propane engines is cleaner than the exhaust from gasoline engines.

Investigation

During the procedure, a decision to the effect that no danger existed was rendered. After consultation with the technical adviser and the manufacturer, the decision had to be reversed for the following reasons.

(1) Driving in reverse is recommended by the manufacturer of the lift trucks, even over the entire distance to be travelled.

(2) Visibility while driving in reverse is certainly reduced, but the operator must check the blind spot by turning around if necessary.

(3) The poor work posture cannot be improved because there are no health regulations governing the ergonomics of work postures.

(4) The engine of the lift truck was properly adjusted and the CO level was measured, producing a reading below the maximum.

Decision and reasons

The original decision and the recommendations have been amended by the decision of April 20, 1990.

Follow-up

The employer certified in writing that it would maintain a CO measuring device on the work site in section 50-51. The engines are adjusted regularly.

The file was closed on April 20, 1990.

Richard Robert
Canada Safety Officer
Occupational Safety and Health

RR/ld

29-05-90"

(translation)

It should be noted that Mr. Rousseau sent to Mr. Mathon's residence, by registered mail, a copy of his reply and accompanying documents. Mr. Mathon in fact received this correspondence on or about June 18, 1990.

On May 18, 1990, further to Mr. Rousseau's letter, Richard Robert sent André L'Allier a letter in which he enclosed the decision he issued in the work place and the recommendations accompanying it. Mr. Robert informed Mr. L'Allier of the following:

"After consulting Labour Canada's technical adviser and Hewitt Equipment's technical advisers, I had to reverse my decision, because it was not supported by any regulations or recommendation of the manufacturer of lift trucks, and to conclude that there was no danger. Where there is no danger, no direction is issued.

Your request to review a direction that was never issued cannot therefore be considered."

(translation)

On or about May 25, 1990, Mr. L'Allier met with Mr. Mathon. A discussion ensued, following which Mr. Mathon signed a letter of May 25, 1990 requesting, pursuant to section 129(5), that safety officer Robert's decision be referred to the Board. This was done on June 1, 1990.

III

The objections

The applicant's objections

The Board will deal first with the preliminary objections. It will consider first Mr. Mathon's objection to the effect that the Code does not permit Mr. Robert to rescind his decision. Section 18 of Part I of the Code, the applicant

argued, empowers the Board to change its mind, but Part II does not contain a similar provision that allows a safety officer to do the same.

In reply to this objection, the employer argued that the decision of March 29, 1990 was an interim decision and that safety officer Robert issued his final decision on April 20, 1990. The employer referred to a decision of Board Vice-Chairman Brault in Denis Gagnon and Jean-Claude Michaud (1986), 65 di 137 (CLRB no. 572), in which the complainants argued that a Labour Canada safety officer had reversed his decision. Vice-Chairman Brault had the following to say:

"The complainants made much of their allegation that the Labour Canada investigation officer changed or, in their words, 'reversed' his own decision on July 18, when he rejected the employees' request. The complainants urged the Board to set aside the 'second' decision on the grounds that it was contrary to the rules of natural justice.

The excerpt from the investigating officer's report quoted earlier (pages 138-139) describes a preliminary decision of July 16 upholding the right to refuse to work, and a 'final' decision of July 18, this time concluding that there was no imminent danger.

The evidence reveals that the parties were not clearly informed that the July 16 'decision' was merely an interim finding. The complainants had good reason to believe that it was final, as did their foreman, Mr. Daigle, who himself appears to have been under the same impression since he made the inspector put this decision in writing.

The safety inspector fulfils a difficult and delicate role. There is no doubt that an investigating officer can take time to reflect and do additional research before dealing with the employees' request. He is not omniscient. However, if he decides, as in the instant case, to postpone his decision, he must ensure that this action is clearly understood by all the interested parties.

The Board is not the watchdog that monitors the operation of Labour Canada's health and safety services in matters relating to health and safety. Our jurisdiction is strictly one of appeal, and then only on the question of whether or not a danger exists. Beyond that, it is not up to the Board to tell the inspectors how to proceed, and less still to exercise some sort of general superintending authority over Labour Canada's

health and safety services. These matters are the responsibility of the courts.

However, it appears to us that, in the spirit of co-operation and complete openness that must attend decisions relating to safety, an investigating officer who wishes, for example, to pay another visit to the work site in question, would do well to ensure that both sides are aware of his action and are given the opportunity to be present, if they so desire.

One final remark. The provisions of Part IV of the Code respecting an appeal from a decision concerning the existence of danger have been amended since the hearing in this case took place. The only decisions that can now be appealed are those that reject an employee's right to refuse to work. These legislative changes may have persuaded safety officers to rely even less on the practice of rendering 'interim' decisions that so-called 'final' decisions could subsequently 'reverse'. The imbroglio to which this practice can give rise at the appeal stage would only be magnified, and hence the need for added caution."

(pages 148-149; emphasis added)

Mr. Mathon's representative claims that the Board should not consider Board decisions subsequent to the above-quoted decision because this case was heard before the provisions of Part IV (now Part II) of the Code were amended. The Board wishes to point out to the applicant's representative in this regard that the decision in Denis Gagnon and Jean-Claude Michaud, supra, was issued after the amendment. Moreover, the Board, in its comments, urges safety officers to rely even less on the practice of issuing interim decisions that so-called final decisions could subsequently reverse.

In the instant case, we note that safety officer Robert did not follow the good advice offered in the above-quoted excerpt, which is the reason for one of the problems that Mr. Mathon now faces. The evidence reveals that Mr. Robert was not very comfortable handling this type of case since

he had only a superficial knowledge of the operation of lift trucks.

The question the Board must now answer is this: Did safety officer Robert issue one decision or two?

To answer this question, we must refer to section 129(2) of the Code, which reads as follows:

"129.(2) A safety officer shall, on completion of an investigation made pursuant to subsection (1), decide whether or not

(a) the use or operation of the machine or thing in respect of which the investigation was made constitutes a danger to any employee, or

(b) a condition exists in the place in respect of which the investigation was made that constitutes a danger to the employee referred to in subsection (1),

and he shall forthwith notify the employer and the employee of his decision."

(emphasis added)

This section stipulates the procedure the safety officer must follow. It is on completion of the investigation that the safety officer forthwith notifies the employer and the employee of his decision. We must therefore determine when safety officer Robert completed his investigation and see what decision he issued at that point.

Even though the handwritten document issued by Mr. Robert on March 29, 1990 creates confusion as to the length of the investigation, it is clear that the Board has no alternative but to conclude, in the light of the recommendations accompanying this decision, the testimony given by Mr. Robert before the Board, the notes he wrote the same day, the facsimile he sent to Mr. Lachaine with a copy to Mr. L'Allier of the union, the report of circumstances of

May 29, 1990, Mr. Robert's consultations with the Labour Canada technical officer, further consultations and his return to the work site on April 12, 1990 to measure exhaust emissions, that Mr. Robert completed his investigation on April 20, 1990 and that he was not in a position to issue a final decision on March 29, 1990. The decision he issued that day, even though there was no need for him to do so, is in fact an interim decision that he finalized on April 20, 1990 on completion of his investigation.

The Board therefore dismisses the applicant's preliminary objection and declares that we are dealing in the instant case with one decision, issued on April 20, 1990, to the effect that no danger existed.

The employer's objection

The Board will now deal with the employer's timeliness objection.

Counsel for the employer argued that Mr. Mathon's initiative was not taken within the seven-day time limit provided by section 129(5) because, in his opinion, Mr. Mathon should have been informed of the safety officer's final decision on April 20, 1990 and not later than April 29, 1990, when the union representative, Mr. L'Allier, received a copy of the final decision.

Counsel for the employer argued that as soon as the union received the final decision, it should have contacted Mr. Mathon. The Board should therefore conclude that the seven-day time limit provided by section 129(5) began to

run, at the latest, on April 29, 1990, when Mr. L'Allier received a copy of the final decision.

Mr. Mathon, for his part, claimed that he did not receive the decision until he signed the letter of May 25, 1990 requesting the reference.

Section 129(5) of the Code reads as follows:

"129.(5) Where a safety officer decides that the use or operation of a machine or thing does not constitute a danger to an employee or that a condition does not exist in a place that constitutes a danger to an employee, an employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing or to work in that place, but the employee may, by notice in writing given within seven days of receiving notice of the decision of a safety officer, require the safety officer to refer his decision to the Board, and thereupon the safety officer shall refer the decision to the Board."

(emphasis added)

In two decisions, the Board has had to deal with the question of the seven-day time limit provided by section 129(5). The parties can refer to these two decisions that affect longshoremen in the port of Montréal. They are Rosario Coulombe (1989), as yet unreported CLRB decision no. 747, and Gilles Lambert (1989), as yet unreported CLRB decision no. 748.

In these decisions, the Board held that the seven-day time limit begins to run from the date on which the employee who exercised his right to refuse received the written decision.

In Gilles Lambert, supra, the Board held that the seven-day time limit began when the union representative notified Mr. Lambert that he (the representative) had received, on Mr. Lambert's behalf at the union's address, the safety

officer's decision. It should be noted that in that case, Mr. Lambert had requested that all correspondence addressed to him in connection with his case be sent to the union's office. The following is an excerpt from that decision:

"Pierre Rousseau, regional safety officer, filed with the Board two excerpts from the Operations Program Directive suggested as a response to applications under Part II of the Code. The first passage outlines the procedure to follow when a safety officer makes a decision as to whether there is a danger. The second sets forth the procedure to follow when a safety officer gives directions under sections 145(1) and (2). An appendix to this Directive contains draft standard accompanying letters. We shall come back to these. The passage from the first document that concerns us is as follows:

'7.1.e.(ii) As far as possible, the safety officer's decision should be given immediately in writing to the employer and the employee. If the decision is given verbally, the safety officer will confirm in writing as soon as possible, either by registered mail or by handing it personally to the two parties, having them sign an acknowledgment of receipt.

(iii) It is important to establish clearly the date on which the safety officer's decision is received by the employee, because that date is a determining factor in the calculation of time under subsec. 86(5).'

In this case, the safety officer sent his written decision to Mr. Lambert's attention at the address of his union because he had failed to obtain Mr. Lambert's home address. The union received the decision by regular mail on February 10, 1989. Mr. Iavarone informed Mr. Lambert of its receipt on Monday, February 13. The two met on February 17 to prepare the request for reference. Mr. Lambert testified that he had never seen officer Hamel's decision. In this case I find that, even though Mr. Lambert never received the decision at his home, since his union informed him on February 13 that the written decision was available at its office, the period prescribed in section 129(5) began to run from this date. In fact, Mr. Lambert merely had to ask Mr. Iavarone to send him the decision. Be that as it may, by requesting a reference on February 17, he acted within the seven-day period provided for in section 129(5) of the Code."

(pages 8-9)

In this case, Mr. Robert did not follow the directives filed by Mr. Rousseau. Far from it, to say the least.

In the light of the interpretation of the time limit provided by section 129(5) and the situation described in Gilles Lambert, supra, the Board cannot accept the argument of counsel for the employer.

Mr. Robert stated during his testimony that, to his recollection, he sent Mr. Mathon, at the union's address, a copy of a letter to Mr. Lachaine and a copy of the decision. According to this letter, Adrien Mathon had received these documents.

He also referred to an agreement apparently concluded with the longshoremen's union to send correspondence involving refusals to work to the union. The Board notes that this type of agreement does not affect the requirements of the Code, namely, that the decision be sent to the employee and to the employer.

In a letter to the Board in reply to the objection of counsel for the employer, Mr. Mathon states that he learned of the decision on or about May 29, 1990.

The evidence shows that Mr. Mathon did not receive the decision in his case at his residence until May 25, 1990. The Board therefore concludes that Mr. Mathon was informed of the safety officer's decision on or about May 25, 1990.

Section 129(5) provides that the safety officer shall forthwith notify the employer and the employee of his decision.

The Labour Canada directive cited in Gilles Lambert, supra, impresses upon its safety officers the importance of

establishing clearly the date on which the safety officer's decision is received by the employee and states that the officer should send the decision by registered mail or hand it personally to the two parties.

Nothing in the Code supports the conclusion that it is the responsibility of the union, in lieu of the safety officer, to inform the employee who exercised his right to refuse of the decision and nothing in the evidence supports the conclusion that Mr. Mathon was informed of the decision in accordance with the requirements of section 129(2) before he requested a reference. The Board therefore dismisses the employer's objection and declares that the reference is deemed to have been made within the seven-day time limit provided by section 129(5)

IV

The merits

Arguments of the parties

The applicant's representative argued that the Board should reverse the safety officer's decision to the effect that no danger existed, for the following reasons.

- The officer's notes on file reveal that there was danger.
- The operator's field of vision while driving in reverse is reduced by 50% to 60%, which poses a danger to the operator and to the persons in his vicinity.
- Breathing propane mixed with oil and carbon monoxide from an improperly adjusted engine irritates the eyes and inhaling this mixture poses a danger to the operator. Moreover, the sampling of emissions that was done on April 20, 1990 cannot be relied on because the engine may have been adjusted. The more appropriate conclusion is that if the sampling had been done on March 29, it would have shown an abnormal level of contaminants.
- Driving in reverse with the head turned is a dangerous posture according to ergonomic criteria.

- The lift truck is not designed for driving in reverse over such a long distance.
- The location of the controls for the brake pedal, the accelerator and the clutch is such that driving in reverse is not a safe manoeuvre.
- There is no rear-view mirror on this lift truck.
- There are no shock absorbers.
- There is no signaller.
- Moreover, the presence of asbestos dust justified the continued refusal to work.

Mr. Mathon's representative concluded by arguing that the objective of Part II of the Code, the safety and health of the employee, should be the determining factor in any decision as to whether or not a danger exists and that on April 20, 1990 safety officer Robert should have upheld Mr. Mathon's refusal.

Counsel for the employer, for his part, argued that officer Robert's decision of April 20, 1990 was justified for the following reasons.

- Driving the lift truck in reserve is inherent in the work of a lift truck operator.
- The lift truck used is a regulation vehicle and is in working order.
- The measurement of the carbon monoxide toxicity level on April 12, 1990 was taken according to regulations.
- Transporting two pallets by driving in reverse is a common practice of this employer.
- The question of the presence of asbestos dust was never given as one of the reasons for exercising the right of refusal.
- The record contains no reference to carbon monoxide.
- The grade at the exit from the shed makes it necessary to drive in reverse in order to clear this obstacle.
- The lift truck is operated in accordance with the operator's manual.
- The distance travelled while driving in reverse is reasonable and the operator's manual places no limit on this distance.

- There were no obstacles at ground level and no abnormal conditions.

Consequently, for these reasons, the Board confirms safety officer Robert's decision.

The decision

The Code defines the concept of danger as follows:

"'danger' means any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected."

In David Pratt (1988), 73 di 218; and 1 CLRBR (2d) 310 (CLRB no. 686), the Board analysed the concept of "danger" as it applies to the exercise of the right to refuse to work, following the 1984 amendments to Part IV (now Part II) of the Code:

"Danger is defined in the Code as:

"'danger' means any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected."

(emphasis added)'

If one recalls that Part IV of the Code referred to 'imminent danger' prior to the adoption of the present definition of danger in 1984, it is readily apparent from the carefully chosen words in the definition that the legislators intended to retain an essence of immediacy in the concept of danger as it relates to an employee's right to refuse under sections 85 and 86, and also to a safety officer's powers to issue a direction in dangerous situations under section 102(2).

Let me be very clear on this, I am not suggesting for one minute that Parliament sought to curtail the rights of employees to refuse to work when faced with danger. Those rights are still as broad as ever and this Board has already said that the protection offered to employees under Part IV against discipline or other reprisals by employers for having exercised their right to refuse is no less than it was before - see Roland D. Sabourin (1987), 69 di 61 (CLRB no. 618). What I am suggesting is that Parliament removed the word 'imminent' from the concept of danger under Part

IV but replaced it with a definition that has virtually the same meaning. By using the definition it did, Parliament merely adopted the definition that Labour Canada and the Board had applied to imminent danger prior to the amendment:

...

In short, very little has changed as a result of the removal of the word imminent. The role of safety officers and of the Board vis-à-vis the right to refuse remains the same for all intents and purposes, that is, to determine whether the risk of injury or illness to employees is so acute that the use of the particular machine, thing or place must cease until the situation is rectified.

Not only must the risk of danger be immediate, it must also involve a hazard or condition that was intended to be covered by Part IV. I agree with the safety officer's view in this case that danger under Part IV regarding an employee's right to refuse under sections 85 and 86 and also under section 102(2), which refers to the powers of safety officers to issue directions in dangerous situations, was not intended to deal with danger in the broadest sense of the word. For the purposes of these sections, which I believe are the only provisions in Part IV that refer to danger, the risk cannot be something that is inherent in an employee's work or a normal condition of employment (section 85(2)). ...

...

To fully appreciate the proper interpretation of danger under Part IV, one must understand where the right to refuse fits into the overall scheme of this Part of the Code. First, the purpose:

'79.1. The purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies.'

These worthy goals are meant to be attained through proper safety and health attitudes on the part of employers, employees and trade unions. The underlying theme of Part IV is founded upon enlightened discussion and co-operative resolution of disputes. Safety cannot be treated like other conditions of employment that are subject to our adversary collective bargaining system under Part V of the Code with its give-and-take according to prevailing strengths. Safety and health should not have to be compromised.

...

It can be seen from the foregoing that the right to refuse is not the primary vehicle for attaining the objectives of Part IV of the Code. It is there to promote early recognition of hazards so that they are brought to the attention of those responsible for safety in the work place. The right to refuse is also an emergency measure to deal with dangerous situations which crop up unexpectedly. In that context, it becomes clear

why danger is defined as it is. The purpose of the right to refuse is not to settle longstanding disputes or to bring to a head differences involving technology or production practices. (See William Gallivan (1981), 45 di 180; and [1982] 1 Can LRBR 241 (CRLB no. 332); and Ernest L. LaBarge (1981), 47 di 18; and 82 CLLC 16,151 (CLRB no. 357).) The right to refuse is there to deal with situations which require immediate attention, hence the requirement for immediacy in the definition of danger. I should add that, because a safety officer or the Board finds that there is no immediate danger to an employee and that the operation can resume, it does not mean that danger in the strict sense of the word does not exist at all. There may still be reason enough for the circumstances to be investigated further through the safety and health committees or representatives with a view to reducing the risk of injury or illness, or for instigating a study into the long-term effects of the hazard or condition that caused the employee's anxiety in the first place."

(pages 223-226; and 315-318; emphasis added)

In Rosario Coulombe, supra, the Board said the following:

"As for the first situation, namely, Mr. Simard's decision that no danger existed, counsel for the union asked the Board to give a broad interpretation to the word danger. Counsel also asked the Board to conclude that a dangerous situation is created as soon as an employer contravenes an occupational safety and health statute or regulation or regulatory standard on equipment.

The precedent I cited approvingly earlier in these reasons does not allow me to accept the union representative's argument. The word 'danger' must be given a narrow interpretation, and objective criteria must be used to determine whether or not danger exists."

(page 21)

The Code sets forth the circumstances in which the right to refuse can be exercised:

"128.(1) Subject to this section, where an employee while at work had reasonable cause to believe that

(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or

(b) a condition exists in any place that constitutes a danger to the employee,

the employee may refuse to use or operate the machine or thing or to work in that place.

(2) An employee may not pursuant to this section refuse to use or operate a machine or thing or to work in a place where

(a) the refusal puts the life, health or safety of another person directly in danger; or

(b) the danger referred to in subsection (1) is inherent in the employee's work or is a normal condition of employment."

In Gilles Lambert, supra, we find the following:

- "1. The danger must be immediate and real: in other words, the risk to the employee or employees must be serious to the point where the machine or thing may no longer be used until the situation is corrected.
2. The danger must be one that Parliament intended to cover in Part II of the Code. This would accordingly exclude a danger arising from a situation where the risk is inherent in the employee's work or is a normal condition of work (section 128(2)(b))."

(page 16)

Although it is accepted that the Code must be interpreted in the light of its objective, the health and safety of employees, it must nevertheless be made clear that Parliament, in enacting the provisions of this Code, intended to give direction to its interpretation and, to this end, established certain parameters that must be observed. Moreover, it is these parameters that will be used to analyse the reasons that led safety officer Robert to conclude that there was no danger, within the meaning of the Code, to Mr. Mathon in driving the lift truck in reverse on March 29, 1990.

In Rosario Coulombe, supra, the Board stated that its role in a reference under the Code is to ensure that the safety officer validly concluded that there was no reason to

exercise the right to refuse to work under section 128 of the Code.

The Board must turn now to the allegations of danger to the complainant.

With regard to asbestos dust, the applicant argued that he continued to refuse to work because of the presence of this substance. The evidence showed that this matter was never raised when Mr. Mathon exercised his right to refuse to work and that it was Mr. Robert who decided, on visiting the work site as he has the authority to do, to apply the regulations and require the employer to comply with these regulations.

We turn now to the level of carbon monoxide. Safety officer Robert took the reading of the level of carbon monoxide emitted by lift trucks on April 12, 1990, a few days after the refusal to work. The applicant argued that this reading should be disregarded and that it should be assumed instead that this reading would have been abnormal had it been taken on March 29, 1990.

When Mr. Robert first visited the work site, he did not have with him a device with which to take the required readings and the employer had no such device available in the work place. Moreover, he ordered the employer to provide one in the two sheds under its control. Had readings been taken on March 29, 1990, the results obtained could have been different from those of April 12, but there is no evidence that lift truck 1121 was defective on March 29 or that an improper adjustment caused the emission of a mixture of chemicals that were harmful to Mr. Mathon. In the absence of a measuring device, Mr. Mathon was asked to take a blood test. He refused, and having done so, had he wanted an

accurate reading taken of the carbon monoxide in the exhaust emitted by lift truck 1121, he would have had to insist that this reading be taken. He did not see fit to do so, just as he did not see fit to take a blood test. The April 12 reading of the carbon monoxide level, taken in circumstances similar to those that prevailed on March 29, did not reveal any abnormality, the same being true of the reading taken by the employer a few days earlier. The Board therefore rejects the applicant's argument and finds that on March 29, 1990, the reading of the level of emission from lift truck 1121 would have been similar to the April 12 reading and that this emission did not pose a danger within the meaning of the Code. The Board therefore confirms safety officer Robert's decision on this point.

The Board nevertheless reminds the parties that in situations where external factors may influence the results of readings, it is preferable to immediately take readings that can be used to determine whether or not a danger exists, thereby avoiding any confusion.

All that now remains for the Board to determine is whether the conclusion that driving lift truck 1121 in reverse did not constitute a danger within the meaning of the Code was warranted. To this end, it must consider the text of section 128 of the Code quoted earlier.

Was there an immediate and real danger? If so, was it a danger that Parliament intended to exclude from the scope of section 128 because this danger was inherent in the employee's work or was it a normal condition of employment?

Throughout the hearing, the applicant's witnesses and the applicant himself spoke of the possibility of obstacles in the lift truck's path, such as pieces of wood or other types

of obstacles. However, there is no evidence, either in their testimony or the safety officer's report, that on the day in question, there were in fact such obstacles. Had there been, they could easily have been removed with the co-operation of the parties involved.

The question of possible collisions because of the operators' limited field of vision was also raised. However, no evidence was presented to show that lift truck traffic on the day in question was such as to create an immediate and real danger within the meaning of the Code.

The safety manuals recommend that caution be exercised and speed controlled to offset this limited field of vision. Moreover, there is no regulation that prohibits driving lift trucks in reverse. The uncontested evidence shows that the requirement that the lift truck operator transport two pallets at a time while driving in reverse is a standard practice of the employer. Mr. Lefebvre told the Board that this was not the first time a lift truck operator had been required to do so. Moreover, the vessel that was at the dock in this case was largely loaded in this manner. The operators who testified before the Board told us that when a load was too bulky, preventing forward operation, they drove their lift truck in reverse. They also stated that it is standard practice in the trade to drive in reverse when transporting a load down a grade.

The Board concludes, as did the safety officer, that in the circumstances in question the limited field of vision did not constitute a danger within the meaning of the Code.

Finally, the Board must determine whether the machine used conformed to standards and whether driving it in reverse,

the manoeuvre performed in this case, constituted a danger within the meaning of the Code.

Nothing in the evidence adduced shows that lift truck 1121 did not conform to the regulations or the standards of the manufacturer, or that it was defective.

There was mention of a rear-view mirror and a signaller required by the materials handling regulations. These regulations exclude elevating devices from the definition of "materials handling equipment," even though the applicant is asking the Board to conclude that a lift truck is not an elevating device. The safety officer considered these regulations arising from the Code and concluded that they did not apply in the instant case. In our opinion, his interpretation is not unreasonable even if the applicant claims that lift trucks are not designed to be driven in reverse, let alone over long distances. His testimony and that of fellow operators reveals that in a number of situations it is recommended, for safety reasons, that lift trucks be driven in reverse. The evidence and the documentation produced show that driving in reverse is a normal part of the work of a lift truck operator.

The design of the fork lift might not comply with ideal ergonomic standards. However, this design in no way limits the operation of the fork lift in reverse.

As for the distance travelled, the safety training manual of the Association sectorielle - fabrication d'équipement de transport et de machines defines a lift truck as follows:

"A handling vehicle designed to pick up loads (pallets, cases, skids, containers), transport them over relatively short distances, not exceeding the boundaries of company property, and depositing them in the required location."

(page 35; translation; emphasis added)

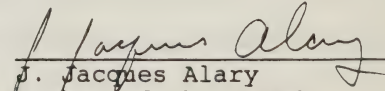
There is no restriction on the direction of movement where forward visibility is limited, and as the Board said earlier in these reasons, there are no regulations that prohibit driving a lift truck in reverse.

Reference was also made to vibrations and their impact on the spinal column. There is no evidence that the vibrations emitted by lift truck 1121 on the day in question were abnormal.

Although the Board sympathizes with the applicant's position of wanting to improve the method of operating lift trucks to make it even safer, the Board reminds him that it is not the ideal forum for achieving his goal. The safety and health committees clearly are more effective forums where the observations of Professor Planché of the University of Quebec at Montréal can be discussed and, we hope, lead to the improvement of the working conditions of the lift truck operator.

The Board declares that the manner in which lift truck 1121 was operated on March 29, 1990 did not constitute a danger within the meaning of the Code.

The Board therefore upholds safety officer Robert's decision of April 20, 1990 to the effect that no danger existed.


J. Jacques Alary
Member of the Board

ISSUED at Ottawa, this 27th day of September 1990.

information

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Summary

CANADIAN BROTHERWOOD OF RAILWAY,
TRANSPORT AND GENERAL WORKERS,
COMPLAINANT UNION, AND BIG WHEELS
TRANSPORT & LEASING LTD.,
RESPONDENT EMPLOYER.

Résumé de Décision

LA FRATERNITÉ CANADIENNE DES
CHEMINOTS, EMPLOYÉS DES TRANSPORTS
ET AUTRES OUVRIERS, SYNDICAT
PLAIGNANT, ET BIG WHEELS TRANSPORT
& LEASING LTD., EMPLOYEUR INTIMÉ.

Board Files: 745-3642
745-3726



Dossiers du Conseil: 745-3642
745-3726

Decision No.: 825

No de Décision: 825

During a hearing in Charlottetown on September 19, 20 and 21, 1990, the employer, Big Wheels Transport & Leasing Ltd., admitted that it had committed an unfair labour practice when it wrote a letter to employees during an organizing campaign by the Canadian Brotherhood of Railway, Transport and General Workers. The Board found that the letter contained intimidation, coercion and threats designed to deter the employees from opting for a union. This was contrary to sections 94(1)(a), 94(3)(a) and (e) and 96 of the Canada Labour Code (Part I - Industrial Relations).

Au cours d'une audience tenue à Charlottetown les 19, 20 et 21 septembre 1990, l'employeur, Big Wheels Transport & Leasing Ltd., a admis avoir commis une pratique déloyale de travail lorsqu'il avait envoyé une lettre aux employés pendant la campagne de recrutement menée par la Fraternité canadienne des cheminots, employés des transports et autres ouvriers. Le Conseil a jugé que cette lettre constituait des menaces et de la coercition en vue d'empêcher les employés de choisir d'appartenir à un syndicat. Cette lettre allait à l'encontre de l'article 96 ainsi que des alinéas 94(1)a), 94(3)a) et e) du Code canadien du travail (Partie I - Relations du travail).

In order to counteract the harm done by the letter to the union's organizing campaign, the Board ordered the employer to write to the employees, advising them it was withdrawing the letter and enclosing a copy of the reasons for decision. The Board also required the employer to provide, at its expense, an opportunity for the union to send to all employees such written material as it deems appropriate. Finally, the Board authorized the re-opening of the union's campaign until December 15, 1990 in order that employees would have an opportunity to make their real wishes known.

Afin de réparer le tort causé par la lettre à la campagne de recrutement du syndicat, le Conseil a ordonné à l'employeur d'informer les employés par écrit qu'il révoquait sa lettre et de leur transmettre une copie des présents motifs de décision. En outre, il a ordonné à l'employeur de donner, à ses frais, la possibilité au syndicat de faire parvenir aux employés toute la documentation jugée nécessaire. Enfin, le Conseil a autorisé la reprise de la campagne du syndicat jusqu'au 15 décembre 1990 pour permettre aux employés de faire connaître leur volonté.

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Reasons for decision

Canadian Brotherhood of
Railway, Transport and
General Workers,

complainant union,

and

Big Wheels Transport &
Leasing Ltd.,

respondent employer.

Board Files: 745-3642
745-3726

The Board consisted of Vice-Chairman Thomas M. Eberlee and
Members Calvin B. Davis and Jacques Alary.

Appearances:

Gordon Forsyth, for the complainant union;

Derek Key and David Clark, for the respondent employer.

These reasons for decision were written by Vice-Chairman
Thomas M. Eberlee.

I

At a hearing in Charlottetown, P.E.I., on September 19, 20
and 21, the Board had before it two complaints by the
Canadian Brotherhood of Railway, Transport and General
Workers (C.B.R.T.) alleging unfair labour practices by Big
Wheels Transport & Leasing Ltd. during the course of the
C.B.R.T.'s campaign to organize Big Wheels' employees.

After the employer had presented its explanation of the
circumstances giving rise to the complaint in File 745-3726
- in accordance with the procedural requirement of section
98(4) of the Canada Labour Code (Part I - Industrial
Relations) - the union asked for, and received from the
Board, consent to withdraw the complaint.

A portion of the complaint in File 745-3642 relating to two individuals who worked for Big Wheels had already been settled and withdrawn. The remainder of the complaint was to the effect that a letter written by an official of Big Wheels to all owner-operators and drivers, dated April 26, 1990, and concerning the C.B.R.T.'s organizing drive, placed the company in violation of sections 94(1)(a), 94(3)(a) and (e) and 96 of the Code and thereby adversely affected the success of the drive.

These sections read as follows:

"94.(1)(a) No employer or person acting on behalf of an employer shall participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; or

94.(3)(a) No employer or person acting on behalf of an employer shall refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,

(ii) has been expelled or suspended from membership in a trade union for a reason other than a failure to pay the periodic dues, assessments and initiation fees uniformly required to be paid by all members of the trade union as a condition of acquiring or retaining membership in the trade union,

(iii) has testified or otherwise participated or may testify or otherwise participate in a proceeding under this Part,

(iv) has made or is about to make a disclosure that the person may be required to make in a proceeding under this Part,

(v) has made an application or filed a complaint under this Part, or

(vi) has participated in a strike that is not prohibited by this Part or exercised any right under this Part;

94.(3)(e) No employer or person acting on behalf of an employer shall seek, by intimidation, threat of dismissal or any kind of threat, by the imposition of a financial or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of a trade union or to refrain from

(i) testifying or otherwise participating in a proceeding under this Part,

(ii) making a disclosure that the person may be required to make in a proceeding under this Part, or

(iii) making an application or filing a complaint under this Part;

96. No person shall seek by intimidation or coercion to compel a person to become or refrain from becoming or to cease to be a member of a trade union."

Early in the hearing, counsel for the employer acknowledged that the letter did constitute an unfair labour practice, contrary to the Code, and should not have been written. For reasons which will become obvious, the Board had no difficulty accepting the employer's admission of having acted illegally. The result was that the only issue in contention at the hearing was the impact of the illegal letter upon the employees and the organizing campaign, and the remedy the Board should prescribe to counteract the industrial relations damage done by the letter.

II

Big Wheels is in the business of general freight trucking throughout Canada and the United States, although its operations tend to be concentrated in the triangle formed by St. John's, Newfoundland, Boston, Massachusetts and Toronto, Ontario. The Board was told that the company has eight terminals, one in Montreal, one in Toronto, and six in the Atlantic provinces. It has more than 200 trucks on

the road, 30 of which are driven by company drivers and the remainder by "owner-operators". Some 15 of the latter have more than one unit under contract with Big Wheels.

The C.B.R.T. launched a campaign to become the bargaining agent for employees of Big Wheels on or about April 13, 1990. (On September 18, 1990, one day before this hearing began, the Board received an application for certification of the C.B.R.T. (File 555-3190) as the bargaining agent for "all drivers and owner-operators at Kensington, P.E.I.; Truro, N.S.; Dartmouth, N.S.; Moncton, N.B.; and St. John's, Nfld.")

The author of the letter, Steve Appleby, Big Wheels' accountant, told the Board that when he learned in mid-April about the C.B.R.T. trying to sign up the drivers and owner-operators he couldn't believe the industry could survive a union because it is in a poor economic situation. He heard that the union's objective was more money for drivers and owner-operators; he couldn't imagine the company surviving if its costs went up; if the company didn't survive, there would be no jobs for these people. He concluded that they had a choice of tremendous significance to make and that therefore they should have "facts" in front of them concerning the implications of unionization before they made a decision.

He therefore drafted the following letter and had it distributed to all drivers and owner-operators in their April 30 statements:

"TO ALL OWNER-OPERATORS AND DRIVERS

It has come to our attention that many members of the driving fraternity feel that their interests can be better served through a collective bargaining unit.

We feel it is very important, at this time, to state our opinion on the condition of the trucking industry.

As you are all aware, government regulations require compliance with hours of service, preventative maintenance inspection programs and general driver qualifications. All these things, directly or indirectly, require better earnings to simply stay even with the finances and incomes. We all know, in the end, the customer must pay that bill.

The major problem, as we see it, is that freight rates a customer is willing to pay are not keeping pace with regulatory requirements. The basic cause of this situation, is that there are too many irresponsible companies hauling freight for existing, or even lower rates, with complete disregard for the safety the government regulations are designed to create. Fair players such as yourselves, suffer financially as a result.

Big Wheels believe that the situation will correct itself over time. As a demonstration of its faith, the Company lends money, makes truck payments, renegotiates better deals for individuals, and any thing else our own financial situation allows us to do. All we ask in return is an honest days work, a clean appearance, good service, and a good attitude.

As an individual, you should understand that as a member of a collective bargaining unit, you forego all your individual negotiating rights with the Company. Such is the nature of the beast. The Company would not be willing to demonstrate its faith through financial assistance beyond any collective agreement, if any. You should understand that any financial gain you feel may be made, through a collective agreement can only come from the customer, since virtually every trucking company in the business today is facing serious losses or very slim returns, or is not playing by the rules.

There seems to be a popular conception that Big Wheels administration and service charges are lining its pockets. It is an audited fact that the Company net income for 1989 was less than a 2% return. The Company forecasts a worse year for 1990. It is therefore a fact, that any additional return for an owner operator will come only from the marketplace. A belief that a collective bargaining unit will secure more money at the Company's expense, will serve only to put the company out of business. For many of you, that will mean no job, no payments on equipment, loss of equipment, and even the potential loss of personal homes and assets.

The Company assures you of as good a deal as any bargaining unit can make, while remaining able to stay in business.

This letter is written at a time when we believe you still have a choice. This letter is simply a statement of fact to be sure you have all the

information you need to make your own decision. This letter not intended to be pro- or anti-union. This letter is simply to encourage you to make your own decision, and to not let a decision of such grave importance to you personally, be made by anyone other than yourself.

HOW DOES A UNION ORGANIZER WORK?

Often by making promises, like a politician trying to get elected. Remember the union is free to make unlimited promises, but the company is prohibited by law from making any promises. Take time to consider how realistic any promises are, that the union are making.

BE VERY CLEAR ABOUT THIS!

The union cannot guarantee anything. They may be making all kinds of promises, but everything must be negotiated in the end.

No one has a right to persuade anyone about joining or not joining an union, on Company premises. Anyone doing so will be immediately dismissed.

(signed)

Steve Appleby"

(emphasis added) (sic)

III

The Canada Labour Relations Board has found in numerous previous cases that the language, or implications, or direct or indirect messages of written communications by employers to employees - similar to this one - during organizing campaigns, and concerning the prospect of unionization, have violated the Code. No doubt the employer, too, has become aware of what constitutes illegality in such circumstances and that accounts for its plea of guilty at the hearing in Charlottetown. On the face of it, the letter does indeed violate the Code, and the Board would undoubtedly have so found, even if the employer's admission of wrongdoing had not been forthcoming. Under the circumstances, it is unnecessary for this quorum of the Board to go to particularly great lengths in analyzing the letter or to cite and quote from those previous cases. However, it must be made clear that

our determination of this complaint is indeed ours and is not simply an acceptance of an employer-union agreement.

The letter warns the owner-operators and drivers that they will not be as well off under a collective bargaining regime as they are now. For one thing, says the company, the loans that have helped to keep owner-operators on the road will no longer be available. Moreover, "as a member of a collective bargaining unit, you forego all your individual negotiating rights with the Company". A better deal from the employer will raise the Company's costs, put it out of business and result in "no job, no payments on equipment, loss of equipment, and even the potential loss of personal homes and assets".

The letter claims not to be "intended" to be pro- or anti-union but a fair-minded reader cannot help but note that it makes an anti-union case throughout. It claims that the Company is prohibited by law from making any "promises", but it promises dire consequences if the owner-operators and drivers attempt to get a better deal for themselves via collective bargaining.

Finally, it makes the quite unqualified and therefore incorrect statement that "no one has a right to persuade anyone about joining or not joining an union, on Company premises, (sic). We say "incorrect", because the Code in Section 95(d), and the Board's interpretations of that section in previous cases, have made it clear that an employer cannot legally prevent employees from attempting to persuade each other about such matters on their own time at their place of employment, so long as such activity does not interfere with the employer's efficient operations. (See, for example, Canadian Imperial Bank of Commerce

(1985), 60 di 19; 85 CLLC 16,021; and 10 CLRBR (NS) 182 (CLRB no. 499) or Time Air Inc. (1989), 89 CLLC 16,015; and 3 CLRBR (2d) 233 (CLRB no. 734)). In the context of this case, "their own time" would presumably mean lunch times, coffee breaks, even though taken at Company terminals. One would also have to wonder whether an owner-operator wasn't even on his own time while he waited at a terminal to take his load away, since his remuneration from the Company is related to the actual load he carries and not to time spent.

In other words, with this sentence, the Company went well beyond the legitimate prohibition of persuasion on an employer's premises during the working hours of an employee (as set out in Section 95(d)) and instituted a "blanket prohibition" which then constituted a clear violation of Section 94(3)(a) by the employer.

Obviously a threat of dismissal of a person who fails to observe an illegal prohibition is itself illegal and nothing much more needs to be said. However, it may be fair to add, so as to ease the fears of owner-operators and drivers, that even if the Company had written the prohibition of persuasion within the precise terms of section 95(d) of the Code, a threat of dismissal or an actual dismissal as punishment, would probably still have been illegal. This is because the rest of the letter showed that the employer was suffering from a bad case of anti-union animus and virtually any dismissal during the organizing campaign would have been suspect.

The letter as a whole shows clearly that the employer was not neutral, as it ought to have been, in respect of the owner-operators and drivers' deciding whether or not they

wished to be represented by the C.B.R.T. But more than that, the letter clearly contains elements of intimidation, coercion and threats directed at employees in respect of the union organizing campaign that are contrary to sections 94(1)(a), 94(3)(a) and (e) and 96 of the Code.

IV

It is the experience of the Board that an employer communication of this kind invariably changes the employment environment to the detriment of a union organizing drive. When an employer abandons neutrality and begins to threaten employees with adverse consequences if they unionize, it takes unfair advantage of its special and powerful position and relationship vis à vis those employees. For the individual, it is no longer simply a question of what is the best course of action for him, based on his own assessment of his needs and his analysis of the best way to meet those needs. Instead, he is faced with the complicating factor of being told what the employer wants and what may happen if the employee opposes the employer's wishes. What the employer wants is irrelevant, under the scheme of Canada's industrial relations system until, if employees do opt for the union, the employer and the union sit down at the bargaining table. There is no doubt that Parliament intended employees to be able to decide for themselves the threshold question of whether they would become unionized at all, without having the distraction of employer influence. Experience suggests that this kind of improper interference causes many people to decide that they had better not take any chances with unionization after all, when their real wish is to be able to erect some defence against employer unilateralism.

The extent to which the C.B.R.T.'s organizing campaign has been impaired by the employer's illegal activity is not easy to determine. But the Board must make an attempt to assess it fairly in order to be able to decide what must be done to re-create the pre-letter environment.

The C.B.R.T. introduced the evidence of two witnesses, both employees of the union, who were responsible for the organizing campaign from April onwards. Both claimed that the drivers they talked to before the letter went out were largely in favour of the union. After the letter had been received, support dropped off drastically. Many people actually voiced the fear that they would be fired if they signed a union card or that the company would go out of business and they would lose their jobs.

The evidence of these two union organizers as to the effect of the illegal letter on the employees and the organizing drive might not have been overwhelmingly conclusive and could have been a trifle self-serving. But the testimony of the witness called by the employer in an endeavour to counteract the two organizers illustrated further employer anti-C.B.R.T. machinations which make it obvious that steps must be taken by the Board to even up the situation.

Rod MacAskill identified himself as an owner-operator who is chairman of the "broker committee". This consists of 10 people who purport to represent a membership of 75 or 80 owner-operators. This organization - if it actually can be characterized as such - has never sought or been given any recognition by the C.L.R.B. as a representative of employee interests at Big Wheels. Mr. MacAskill's reaction to the letter was that it was a "typical

management letter" customarily sent out by management. Nobody has ever complained to him about it.

He and other employees - presumably members of the brokers' committee - had had a meeting early in the organizing campaign with Ingham Bryanton, president of Big Wheels, and other members of management at which management made known its opposition to the C.B.R.T. campaign. He became concerned that the company might go out of business and he discussed the C.B.R.T. campaign with fellow owner-operators and drivers. He had a meeting with C.B.R.T. people early in May, 1990 at which time he refused to support the C.B.R.T. It appears that he has campaigned actively against the union and it is probable from his testimony that he has been urged on by the employer.

After listening to Mr. MacAskill, the Board concluded that his evidence did not suggest by any means that the impact of the letter had been minimal. Indeed, the Board concluded that there had been a good deal more to the employer's anti-union campaign than just the letter. The employer had also used Mr. MacAskill to convey its anti-union message to his fellow owner-operators and drivers.

V

The Board has been given the power by section 99 of the Code to require a violator of sections 94(1)(a), 94(3)(a) and (e) and 96 to take steps to remedy its contraventions in order that the parties who have suffered thereby may be "made whole". Under that power, the Board now orders Big Wheels Transport & Leasing Ltd:

1. To cease contravening those sections of the Code forthwith;

2. To send to each and every owner-operator and driver within two weeks of the date of this order a copy of these reasons for decision together with the following letter, to be signed by Ingham Bryanton, on behalf of the company:

"I am enclosing with this letter a copy of a decision of the Canada Labour Relations Board that deals with this company's action in sending you a letter dated April 26, 1990 concerning the union organizing campaign.

At a hearing in Charlottetown on September 19, 1990, the company's lawyer told the Board that the letter is an unfair labour practice and should not have been written.

The Board found that the company's letter constituted a violation of sections 94(1)(a), 94(3)(a) and (e) and 96 of the Canada Labour Code. At the Board's direction, the company withdraws the letter and asks you to disregard it and its contents."

3. To give to the Canadian Brotherhood of Railway, Transport and General Workers the opportunity to provide to each and every owner-operator and driver such written material as the C.B.R.T. may consider appropriate and to pay the cost of distribution of such material.

The Board appoints John Vines, Atlantic Regional Director and Registrar, or an officer designated by him, to assist the parties with respect to the implementation of the

foregoing. The Board will remain seized of the matter in order to ensure that the orders are carried out and will, if necessary, issue a formal order.

As was indicated at the beginning of these reasons, the Board now has before it File 555-3190, an application by the C.B.R.T. for certification as the bargaining agent for "all drivers and owner-operators" at Big Wheels terminals.

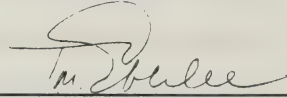
However, in the light of the unfair and adverse impact which the employer's illegal activity has had on owner-operators and drivers during the organizing campaign between the end of April and the present - and in the light of the fact that, with these reasons for decision, the pall of fear that has hung over the campaign is now lifted - the Board believes the C.B.R.T. should be permitted to re-open its campaign for a further period to give owner-operators and drivers an additional opportunity to decide whether they wish to be unionized.

Under Section 17 of the Code,

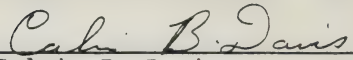
"Where the Board is required, in connection with any application made under this Part, to determine the wishes of the majority of the employees in a unit, it shall determine those wishes as of the date of the filing of the application or as of such other date as the Board considers appropriate."

In this situation, the Board considers it appropriate to determine the wishes of the employees as of December 15, 1990. That, then, will be the last date for the filing with the Board of any further evidence of employee wishes.

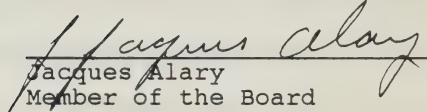
With that exception, the application will be handled in the normal administrative way and will be investigated and reported upon by a Board officer.



Thomas M. Eberlee
Vice-Chairman



Calvin B. Davis
Member of the Board



Jacques Alary
Member of the Board

ISSUED at Ottawa, this 1st day of October 1990.

information

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SUMMARY

LETTER CARRIERS' UNION OF CANADA, APPLICANT, AND CANADIAN UNION OF POSTAL WORKERS AND CANADA POST CORPORATION, RESPONDENTS.

Board File: 530-1783

Decision No.: 826

This case deals with an application for review filed pursuant to section 18 of the Canada Labour Code (Part I - Industrial Relations) seeking to render null and void a representation vote held by the Board. The application was dismissed.

The Board held a mail vote affecting 46 000 employees to determine if they wished to be represented by the Letter Carriers' Union of Canada or the Canadian Union of Postal Workers. All parties had approved the procedure chosen. The applicant established that some 30 ballots had been lost in the mail; however, it did not invoke fraud or unfair labour practice. A total of 88% of the eligible employees participated in the vote.

After examining the evidence and the case law, the Board dismissed the application on the grounds that nothing in the evidence indicated that the vote did not accurately reflect the employees' wishes.

RÉSUMÉ

UNION DES FACTEURS DU CANADA, REQUÉRANTE, SYNDICAT DES POSTIERS DU CANADA ET SOCIÉTÉ CANADIENNE DES POSTES, INTIMÉS.

Dossier du Conseil : 530-1783

Décision n°: 826

Demande de révision en vertu de l'article 18 du Code canadien du travail (Partie I - Relations du travail) visant à faire déclarer nul un scrutin de représentation tenu par le Conseil. Requête rejetée.

Le Conseil a tenu un scrutin par la poste auprès de 46 000 employés afin de déterminer s'ils voulaient être représentés par l'Union des facteurs du Canada ou par le Syndicat des postiers. La procédure choisie a été approuvée par toutes les parties. La requérante a établi que des bulletins avaient été égarés dans le courrier. Aucune fraude ni pratique déloyale n'est invoquée. Le taux de participation a été de 88% des employés éligibles.

Après examen de la preuve et analyse de la jurisprudence, le Conseil a rejeté la requête, aucun élément de preuve ne permettant de penser que la volonté des employés n'a pas été fidèlement reflétée dans le résultat du scrutin.



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Reasons for decision

Letter Carriers' Union
of Canada,

applicant,

Canadian Union of Postal
Workers, and

Canada Post Corporation,

respondents.

Board File: 530-1783

The Board was composed of Mr. Serge Brault, Vice-Chairman,
and Ms. Ginette Gosselin and Mr. Michael Eayrs, Members.

Appearances:

Mr. James L. Shields, for the applicant;

Mr. Gaston Nadeau, for the Canadian Union of Postal
Workers; and

Messrs. Robert Monette and Sean Kennedy, for the Canada
Post Corporation.

These reasons for decision were written by Vice-Chairman
Brault, and Member Eayrs.

I

This decision follows an application for reconsideration
filed by the Letter Carriers' Union of Canada (LCUC), the
applicant, pursuant to section 18 of the Canada Labour
Code (Part I - Industrial Relations). The purpose of the
application is to have the Board set aside and annul the
results of the nationwide vote that led to the
certification of the Canadian Union of Postal Workers
(CUPW) as the bargaining agent of over 46 000 employees
of the Canada Post Corporation (CPC or the employer).

According to the applicant, the results of the representation vote it lost to CUPW were not sufficiently reliable to allow the Board to make an appropriate determination as to majority union support amongst the employees. Allegedly, that determination was not made "on the basis of the ballots cast by all of the employees voting" and should accordingly be discarded.

A hearing was held into these proceedings in Toronto on September 11, 12 and 13 and in Ottawa on September 24 and 25, 1990.

II

The Facts

The vote being challenged by the applicant followed the two applications for review filed in 1985 and in 1987 by the employer as well as by CUPW for an overall review of the bargaining units at CPC. This eventually led to decision Canada Post Corporation (1988), 73 di 66; and 19 CLRB (NS) 129 (CLRB no. 675), where it was found that four bargaining units were appropriate at CPC.

One of these units, known as the operational unit, was to be composed of employees originating from different units which were to be subsumed into a single one. In September 1988, the Board ordered that a representation vote be held to determine which of CUPW or LCUC would be bargaining agent of this newly defined bargaining unit.

The unit is comprised of over 46 000 employees of CPC working out of 700 work locations spread out all over Canada. As was evidenced during the course of the hearing, before finalizing any decision on the form the

vote would take, the Board decided to hold consultations with the parties.

At first, the applicant and the employer favoured a mail vote whereas CUPW and the Board favoured a mixture of mail and ballot box methods, depending on location. In the end, based on a consensus between the parties, the method chosen was that of a mail vote.

In close cooperation with the unions, as well as with CPC, an elaborate system of notification was devised by the returning officer appointed by the Board which led to the issuance of a formal voting procedure in mid-November 1988. More than 3 700 preliminary notices were posted all through CPC's system to alert the employees of the fact that they were going to vote to choose their bargaining agent. They were to follow certain steps in order to ensure that they could exercise their rights, for example supply correct mailing addresses. The eligible employees would subsequently vote by mail during an established period of about eight weeks.

The voting procedure approved by all parties called for each employee to be mailed a "voting kit" comprising, amongst other things, a prepaid return envelope addressed to the Board as well as a secret ballot and a secret ballot envelope. To allow better processing, the Board had secured a special postal code through CPC's commercial services. This postal code, as it turned out, was not strictly exclusive to the Board but was also used by other government departments involved in surveys. Even though the applicant did not raise any issue about the postal code, the panel nonetheless found it appropriate to go into the matter more thoroughly. No clear evidence was

adduced as to precisely who was also a user of this postal code. About half-way through the voting period, the Board realized the postal code assigned was not exclusive to it when it received letters addressed to another agency but bearing the same postal code. This fact was brought to the attention of all parties' representatives who liaised with the Board's returning officer during the voting period. No one raised any objection.

No evidence was adduced indicating that any envelope addressed to the Board was delivered elsewhere, although there was evidence at some point that a dozen or so envelopes out of the close to 41 000 received had been machine-opened and resealed. This led the Board's returning officer as well as the parties' representatives to believe that these envelopes might have been delivered to another department, opened accidentally and resealed. (In passing, after consultation with the parties, in all likelihood on the evidence that the secret ballot envelopes found in these return envelopes had not been tampered with, all parties agreed that these same envelopes should be counted and so they were.)

Turning back to the voting process. Following consultations, on December 22, 1988, the Board issued a document entitled "Procedure in preparation for the count and the conduct of the actual count" establishing in detail the way the votes were to be counted. It called for a pre-count meeting with the parties on January 10, 1989. One of the items on the agenda of that meeting was the following:

"Any unresolved issues will be addressed and ruled on by the Returning Officer. This will clear the way for the actual count to proceed without interruption with few minor exceptions

which can be dealt with on the spot as they may arise during the actual count."

No issues were raised and the parties who met again on January 12 signed the following document:

"We, the undersigned, representing the Canadian Union of Postal Workers, the Letter Carriers' Union of Canada and Canada Post Corporation respectively, ... do hereby certify that the representation vote was carried out in a fair and equitable manner and that all employees in the unit for whom a mailing address was provided were given the opportunity to vote."

Mr. Robert McGarry, then president of LCUC, signed that document on behalf of his union.

The actual counting of the vote took place on January 17. On that occasion, close to 40 000 votes were counted. In accordance with the voting procedure established by the Board's returning officer, 884 return envelopes had previously been ruled invalid. All parties agreed with that finding and the ballot envelopes they contained were ignored.

During the counting process, 120 ballots were declared spoiled and ruled invalid. Again there was no dispute between the parties on that ruling which in fact was made by the parties themselves and accepted by the Board's returning officer. Six return envelopes did not actually contain a ballot. At the end of the day, LCUC obtained the support of 19 380 employees and CUPW, 20 281. Out of 46 523 eligible voters, the Board actually received and considered 40 671 envelopes.

As it turned out, in the week following the close of the voting period, the Board continued to receive envelopes.

It did so until its special postal code was cancelled about a week later. These envelopes totalled a little over 300. Since they were not received on time according to the voting procedure, they were never opened and thus were obviously not taken into consideration in determining majority support.

In essence, the applicant's evidence establishes that while a certain number of employees working in the Toronto region had allegedly voted, their ballots were not received and therefore were obviously not considered by the Board in the final count.

The applicant called 37 witnesses who basically testified to having received a voting kit and, except in a few cases, having mailed their ballots on time, discovered later that the Board had never received their ballots. A substantial number of these witnesses confirmed individual affidavits attesting to the fact that they had indeed mailed their ballots.

There is no need at this point to recount in detail the means used by these witnesses to ascertain whether or not their ballots had been received. In essence, at the invitation of LCUC, invoking the Access to Information Act, a certain number of employees signed "petitions" asking the Board whether it had received their ballots and also asking that it forward its response to such inquiry to the applicant.

The petition in question was made on forms circulated by LCUC shop stewards or other representatives in letter carriers' depots. All these petitions open with the following declaration:

"We the undersigned, respectfully request that the C.L.R.B. provide us with satisfactory proof that our ballots were received and counted in the recent certification vote for bargaining agent of the Operational Unit of Canada Post. We make this request in light of the fact that employees that had an interest in the outcome of the vote had access to, and participated in the processing of our ballots.

We the petitioners have no objection to the board releasing the requested information to a National executive officer of the L.C.U.C."

The Board was eventually able to verify from its voting records that 164 out of a sample of 1 211 signatories were listed as not having voted. The Board's records did not show ballots received under these names, either before or after the date of closure of the vote.

For its part, CUPW called four signatories of the "petitions." While they recognized having signed, they added that they had never voted in the first place.

The evidence shows that LCUC had the petitions signed not long after it had lost the vote. In some cases, a speech or public presentation by an LCUC representative preceded the circulation of these petitions or their actual signature. An LCUC representative would in essence tell employees that they should sign if they wanted "their" union back.

While all witnesses identified their signatures on the petitions, few recalled the circumstances in which it was signed or reading the declaration at the top of each page. It is in such a context that most signed.

Let us now turn to the ballots received after the deadline set in the voting procedure. Soon after the results were

known, rumours started to circulate about huge numbers of ballot envelopes received after the closing date of the voting period and ignored in the count.

On January 30, 1989, a panel of the Board dismissed a request by LCUC that wanted to know the exact number of envelopes received after 4:00 p.m. on January 13, 1989. That refusal was in keeping with the Board's long-standing policy that this type of information is inconsequential since envelopes received after the closing date in a vote conducted by mail are not considered in determining the results of such a vote. A few weeks following that refusal, rumours were still circulating.

The Board then received from an LCUC vice-president its first official request under the Access to Information Act with respect to the disclosure of the number of envelopes received after the closing date. In view of the situation, and for obvious labour relations considerations, the Board decided to depart from past practice and to disclose that the Board had indeed received 342 envelopes after the date of closure. In a letter-decision dated February 16, 1989 it did so in the following terms:

"... it has been brought to the Board's attention that inaccurate and unfounded rumours and speculations as to the number of such ballots returned to the Board after the closing date have been reported in the media, giving rise to a number of allegations that have not been substantiated by facts filed with the Board. The Board has also received an official request under the Access to Information Act from Mike Villemaire, a Vice-President of the Letter Carriers' Union of Canada, asking for the same information.

The Board's position is that it does not have to provide this information under the Access to Information Act. However, in order to put an end to such speculations by the media and others, the Board quorum of Mr. M. Brian Keller,

Vice-Chairman, Mr. Victor Gannon and Mr. Jacques Archambault, Members, has decided to release the information. The number of return envelopes received between the closing date and the date of this letter is 342."

III

A. The Law

The Code contains few provisions dealing with votes. The relevant ones are as follows:

"28. Where the Board

(a) has received from a trade union an application for certification as the bargaining agent for a unit,

(b) has determined the unit that constitutes a unit appropriate for collective bargaining, and

(c) is satisfied that, as of the date of the filing of the application or of such other date as the Board considers appropriate, a majority of the employees in the unit wish to have the trade union represent them as their bargaining agent,

the Board shall, subject to this Part, certify the trade union making the application as the bargaining agent for the bargaining unit.

29.(1) The Board may, in any case, for the purpose of satisfying itself as to whether employees in a unit wish to have a particular trade union represent them as their bargaining agent, order that a representation vote be taken among the employees in the unit.

...

30.(1) Where the Board orders that a representation vote be taken among employees in a unit, the Board shall

(a) determine the employees that are eligible to vote; and

(b) make such arrangements and give such directions as the Board considers necessary for the proper conduct of the representation vote, including the preparation of ballots, the method of casting and counting ballots and the custody and sealing of ballot boxes.

...

31.(1) Subject to subsection (2), the Board shall determine the result of a representation vote on the basis of the ballots cast by the majority of employees voting.

(2) Where, on considering the result of a representation vote, the Board determines that less than thirty-five per cent of the employees who are eligible to vote have voted, the Board shall determine that the representation vote is void."

The Board Regulations deal with this matter at section 29.

"29.(1) Where the Board orders that a representation vote be taken, the Chief Returning Officer may appoint a returning officer and deputy returning officers and may give any special directions to ensure the proper conduct of the vote.

(2) Where a returning officer is appointed under subsection (1), he shall conduct the vote on behalf of the Board and report the result of the vote to the Board."

B. The Parties' Submissions

The thrust of LCUC's submissions is to say that the mere fact that any ballots were lost invalidates the whole vote. This is in their view a major irregularity sufficient to warrant a new vote regardless of the fact that no fraud or other malpractice is alleged.

Even though LCUC commended the Board and its officers for the way the vote was conducted, counsel nonetheless argued the nullity of the vote. He did so regardless of the fact that the whole procedure was cleared with the parties beforehand and found to have been properly carried out at every level. For counsel, the fact that the mail was chosen as a means to collect the ballots and that some ballots were lost in the process is sufficient to disqualify the whole process regardless of the numbers involved. For the applicant, the decisive factor is that

at least some employees have indeed voted and that their ballots have been lost. This was characterized as an irregularity warranting the remedy sought.

Counsel relied on the following case law: Crosbie Offshore Services Limited (1982), 51 di 120 (CLRB no. 399); Kerrville Bus Co., Inc. (1981), 257 NLRB 18,256; NLRB v. Lorimar Productions, Inc. (1985), 120 LRRM 2425 (U.S.C.A., 9th Cir.); Queen City Paving Company (1979), 243 NLRB 15,996; and Security '76/Division of International Total Services, Inc. (1984), 272 NLRB 16,712.

For his part, counsel for CUPW challenged LCUC's assertion that there were any irregularities in the process. For counsel, if there was anyone familiar with the fact that in any large mailing some mail is always likely to disappear, be damaged or otherwise unaccounted for while being processed, it was the parties involved in these proceedings.

Counsel also challenged the factual conclusions LCUC is inviting us to draw from the "petitions." He insisted that nothing establishes that all individuals who signed LCUC petitions requesting information about their ballot allegedly cast had indeed voted. He mentioned the four witnesses who had not voted, but had signed the petition. He argued that the letter carriers were under pressure from their union after it had lost the vote.

Counsel further added that if indeed the Board found that there were some irregularities as argued by the applicant, none would be significant in the end result. He challenged LCUC's assertion that the Board could project

across the nation the numbers established by LCUC for a single region. For counsel, in no way was there sufficient evidence to warrant that the Board extrapolate from what he characterized as isolated and unrelated facts.

Counsel relied on the following case law: Re Pollard and Patterson et al. (1974), 50 D.L.R. (3d) 542 (Man. Q.B.); Re Penner and Schreyer et al. (1974), 47 D.L.R. (3d) 462 (Man. Q.B.); Re Wright et al. and Koziak et al., 114 D.L.R. (3d) 549 (Alta. C.A.); Dr. Lomer Pilote c. Dr. Augustin Roy et autres [1976] C.S. 831 (Que.); Howard et al. v. Parrinton et al. (1971), 21 D.L.R. (3d) 395 (Ont. H.C.); CJRC Radio Capitale Ltée (1977), 21 di 416; [1977] 2 Can LRBR 578; and 78 CLLC 16,124 (CLRB no. 89); Pacific Plastics Ltd., [1981] 3 Can LRBR 185 (B.C.); La Sarre Air Services Limited (Propair Inc.) (1982), 49 di 52 (CLRB no. 377).

Counsel for CPC did not take a position on the merits of this application.

IV

The Decision

The purpose of a vote ordered by the Board is always to ascertain the employees' will with respect to an issue. In this case, the vote ordered was aimed at determining which of two bargaining agents was favoured by the majority of the new operational unit recently defined by the Board.

Section 31(2) of the Code sets out at 35 percent the minimum participation rate required in a vote. This means

that if less than 35 percent of eligible employees take part in a vote, the rate of participation is deemed insufficient to allow the Board to have a fair picture of the employees' will. This means that, all things equal, a return rate of over 35 percent is sufficient.

In this case, the rate of participation in the vote, not counting the 342 envelopes received after the deadline, was close to 88 percent. Indeed the rate of return in this case exceeded the Board's 13 year average rate of return of all votes (mail or ballot box) for units in excess of 100 employees. If the quality of the procedure chosen is in any way reflected in the rate of participation, then the one followed here was of a particularly high quality.

LCUC's application contains the following declaration:

"The Applicant has no knowledge as to the cause of the missing ballots. However, the Applicant submits that the number of missing ballots places into issue the integrity of the voting procedure adopted by the Board in this particular case."

No fraud whatsoever or mishandling of the process is alleged or even suggested. Actually, LCUC's counsel specifically recognized that no fraud of any nature is alleged as having taken place at any time during the process.

Further, everyone involved commended the returning officer, as well as his staff, and recognized that the procedure followed was fair and properly applied throughout. Even though LCUC initially argued that "the number of missing ballots places into issue the integrity

of the voting procedure...", in the end it argued in fact that since ballots had been lost, regardless of numbers, the result was still void.

There are many reasons why the Board cannot agree with a proposition such as this which, if adopted, would actually paralyse the operation of the Code. First, there is no doubt that the Board is empowered to order mail votes. What is required is that the method used to take a vote be reasonable, fair and properly handled. Unfortunately, any procedure, for a host of reasons, exposes a voter to the possibility of his ballot not being considered in the end result.

As is evidenced by the certificate of result, before the votes were counted, the parties recognized the fact that over 800 envelopes had to be discarded for various reasons. Some were not to be counted because, for instance, the employees had failed to sign their names on the back of the return envelopes as required. Obviously, had the Board not resorted to a mail vote, the employees would not have been required to sign the return envelopes or even to mail envelopes. Others were discarded because they were damaged. We fail to see why the employee whose ballot was lost should, all things being equal, be treated differently than the one whose return envelope was damaged or defaced but still managed to reach the Board.

Where a distinction has to be made is where fraud or unfair labour practices are present.

Counsel for LCUC relied on the case of Crosbie Offshore, supra, where the Board cancelled a vote because a single individual not entitled to vote had voted. This is

precisely what fraud is all about. In that case, which did not involve a mail vote, the Board cancelled a vote when it found out that the personnel manager had voted. In that case, the Board found this single irregular ballot serious enough to fear that the "genuine" employees might not have voted according to their own views.

Such is not the case here where no unfair labour practice or misbehaviour of any sort is alleged. The only fact on which the applicant relies is the alleged loss of 37 ballots out of approximately 40 000.

Further, even in assuming that 164 ballots were lost out of the 1 211 signatories of the Toronto petition, a fact which was not established, there is nothing before this Board that would allow the extrapolation of this ratio across the system. If literally applied as hinted, such a projection would actually lead us to conclude that more employees would have voted than the actual number of voters on the voting list.

As the parties recognized when the choice of a mail vote was made in the fall of 1988, this way of canvassing the employees' opinions was the one most likely to ensure the highest rate of participation possible. This is the objective of any vote as implied in section 31(2) of the Code. That choice was clearly vindicated by the high rate of return referred to earlier in these reasons.

No method can be perfect. In a mail vote, ballots can be late or damaged. In this case, the method chosen gave the employees eight weeks during which they could cast their ballots. They only had to complete their ballots in

accordance with the procedure and to mail them in prepaid return envelopes in a timely fashion.

Based on the evidence, there was no pattern of mailing, e.g. letter box vs. postal station; thus nothing can be attributed to the particular method of mailing or return of ballots chosen by any employees.

The Board does not have, nor does it need with respect to the votes it is required to hold, the same means as those available to the Chief Electoral Officer of Canada and a vote ordered by this Board should not be equated to an election for Parliament (CJMS Radio Montréal (Québec) Limitée, 33 di 393; and [1980] 1 Can LRBR 270 (CLRB no. 151)). The duty of the Board is to take the means it deems reasonable to allow the employees to express their wishes freely and in secret.

When no unfair labour practice is alleged or present or any fraud invoked, we fail to see how the Board could reasonably void the results of a vote of this amplitude when the actual rate of participation was so high, on the basis of a few lost ballots as is the case here. To do so would in fact be arbitrary and would undermine the credibility of the whole process. It would also render mail votes impossible when in fact they are often the only reasonable way to proceed in a jurisdiction such as this.

Every now and then, items are lost, destroyed or otherwise not accounted for in the mail. We cannot reasonably believe that when LCUC suggested at the very outset that the Board use the mail, it could not foresee the possibility that items could be lost in the process.

The fact that the Board did not have a strictly exclusive postal code can have no bearing on our decision. This was known to the parties before the votes were counted and was not raised as an issue at the pre-count meeting nor after the counting of the votes. Further, no evidence whatsoever suggests that even a single ballot of those not accounted for could have been misplaced for that reason.

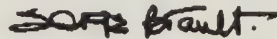
Finally since no cause is known for the lost ballots, it cannot be implied that more losses were suffered on one side than on the other.

As stated in CJRC Radio Capitale Ltée, supra:

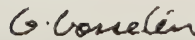
"... the Board must act on a representation vote unless it is convinced that there are serious grounds for ordering its annulment. The person seeking the annulment of a vote must convince the Board that sufficiently serious irregularities took place to warrant such a decision."

(pages 436; 595; and 363)

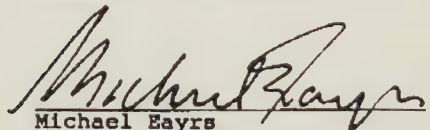
Since there are no grounds to warrant the annulment of the vote in the instant case, this application is dismissed.



Serge Brault
Vice-Chairman

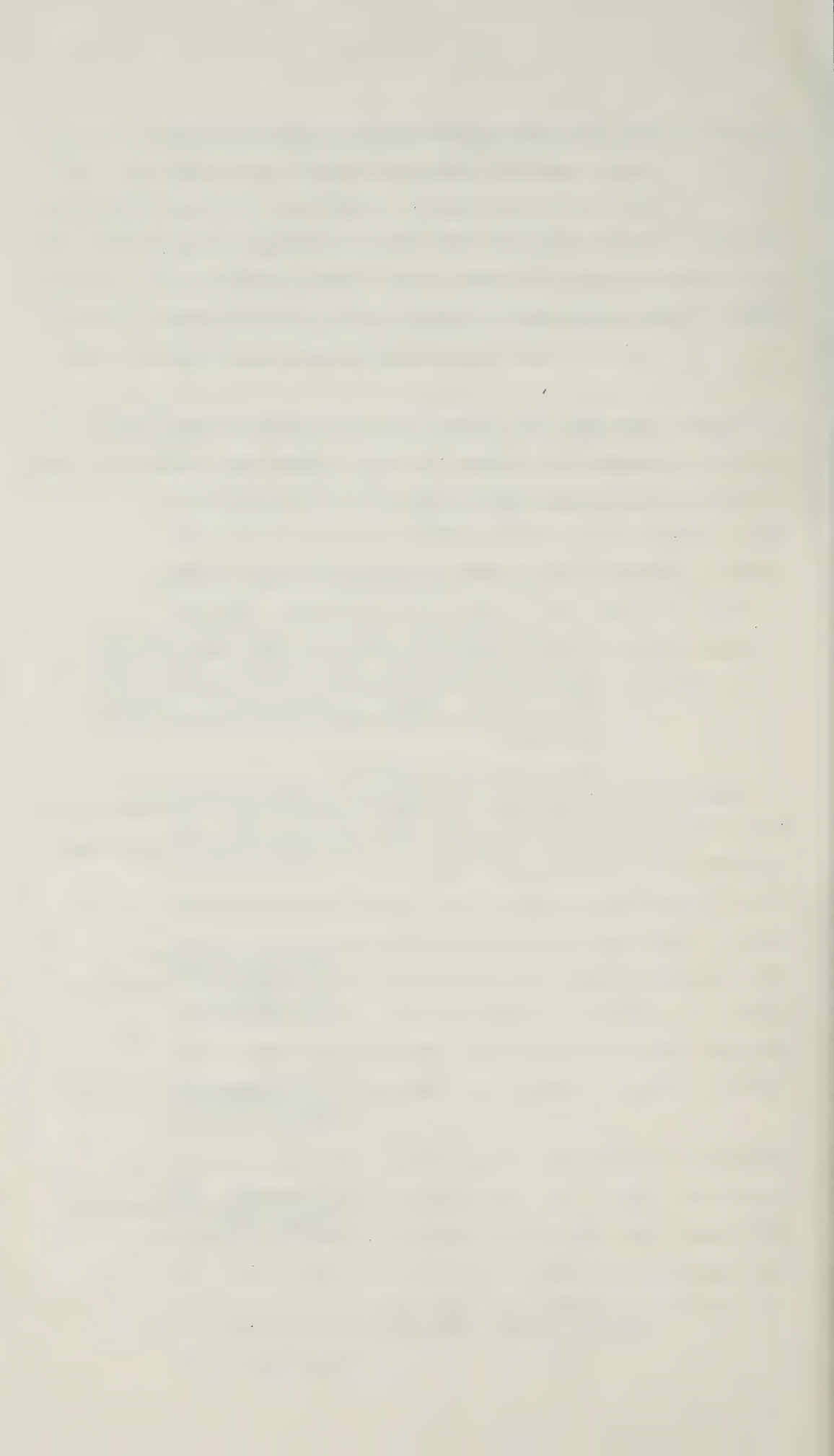


Ginette Gosselin
Member of the Board



Michael Eayrs
Member of the Board

DATED at Ottawa, this 4th day of October 1990.



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SUMMARY

Mr. Christian Thévenot, complainant, and Québecair, respondent.

Board File: 745-3263

Decision No.: 827

In the case of a complaint of unfair labour practice, the Board decided to exercise its power pursuant to section 98(3) of the Code to refuse to hear and determine a complaint if it is of the opinion that the matter "could be referred by the complainant pursuant to a collective agreement to an arbitrator or arbitration board."

After reviewing the recent jurisprudence on the matter, the Board concluded that no statutory right required its intervention in the instant case.

RESUME

M. Christian Thévenot, plaignant, et Québecair, intimée.

Dossier du Conseil: 745-3263

N° de décision: 827

Le Conseil, saisi d'une plainte de pratique déloyale, a décidé d'appliquer le paragraphe 98(3) du Code, qui lui permet de refuser d'instruire une plainte s'il estime que "le plaignant pourrait porter le cas, aux termes d'une convention collective, devant un arbitre ou un conseil d'arbitrage."

Après avoir fait une récapitulation de la jurisprudence récente en cette matière, le Conseil a conclu qu'aucun droit fondamental nécessitait l'intervention du Conseil en l'espèce.



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Reasons for decision

Christian Thévenot,
complainant,
and
Québecair,
respondent.

Board File: 745-3263

The Board was composed of Ms. Louise Doyon, Vice-Chair, and Ms. Ginette Gosselin and Mr. François Bastien, Members.

Appearances:

Mr. Harold Lehrer, accompanied by Mr. Vincent Blais, officer of the IAM, for the complainant; and

Mr. Luc Beaulieu, accompanied by Messrs. Garry Rosen and Victorin Deland, director of labour relations, for the respondent.

These reasons for decision were written by Ms. Louise Doyon, Vice-Chair.

Hearings were held in March, April and May 1990, in Montréal.

I

The Matter at Issue

On May 11, 1989, the complainant filed with the Board a complaint of unfair labour practice alleging violation of sections 94(1), 94(3), 94(3)(a)(i) and 96 of the Canada Labour Code when the respondent dismissed him on March 8, 1989. According to the complainant, the employer's decision

discriminates against him because he is an officer of a trade union and is participating in the development and administration of this trade union.

The complainant has worked for the respondent since 1980. At the time of his dismissal, he was employed as a licenced mechanic subject to the collective agreement concluded between the respondent and the International Association of Machinists and Aerospace Workers (IAM) for the ground employees. On March 13, 1989, the complainant filed a grievance against his dismissal pursuant to the collective agreement. Moreover, on March 17, 1989, he filed a complaint with the Quebec Occupational Health and Safety Commission. He thus invoked section 32 of the Act respecting Industrial Accidents and Occupational Diseases, R.S.Q., c. A-3.001. His complaint alleged that his dismissal was unlawful because it occurred within six months of his having sustained an employment injury.

In its reply to this complaint, the employer not only denied that there was any substance to the allegations of unlawful dismissal, but also asked the Board to either defer consideration of this case, or refuse to hear and deal with it on its merits in accordance with section 98(3) of the Code.

This provision reads as follows:

"98.(3) The Board may refuse to hear and determine any complaint made pursuant to section 97 in respect of a matter that, in the opinion of the Board, could be referred by the complainant pursuant to a collective agreement to an arbitrator or arbitration board."

In a letter dated January 30, 1990, the employer repeated that the Board should deal with the complaint pursuant to section 98(3) of the Code. This letter reads as follows:

"Dear Madam:

We are counsel for the respondent employer, Québecair, in the above-mentioned case.

Please consider this letter a request to the Board to dispose in limine litis of the following preliminary objections.

1. *The complainant resorted to the grievance procedure provided for in the collective agreement. The grievance was duly referred to arbitration, which proceeding began on January 8 before Mr. Marc Boisvert. The case is under deliberation and we believe that it would be advisable for the Board to defer the entire matter pursuant to section 98(3) of the Canada Labour Code.*

2. *The complainant is already benefiting from a reinstatement order issued by the Occupational Health and Safety Commission further to his complaint under section 32 of the Act respecting Industrial Accidents and Occupational Diseases. We respectfully submit that the recourse and remedy have become academic and the Board has no jurisdiction to grant identical redress. There is here what might be termed 'administrative res judicata'.*

3. *In any event, for the reasons stated in the preceding paragraphs, the Board should summarily dismiss Mr. Thévenot's complaint which clearly constitutes a flagrant abuse of the Board's procedures.*

We believe that in proceeding with the Board file, the Board should dispose of the above-mentioned objections through an interlocutory decision or, at its discretion, take them under advisement. We would appreciate it if the Board would inform us of its intentions in this regard in order to save us having to prepare a submission on the merits of the complaint that might prove unnecessary.

Yours truly,

Luc Beaulieu"

(translation)

When the hearing began on March 15, 1990, the Board decided to take the employer's request concerning the application of section 98(3) of the Code under advisement and proceeded

to hear the evidence. However, when he began his presentation of arguments, counsel for the employer repeated his request that section 98(3) be applied, and counsel for the complainant did not have the opportunity to present his own arguments to the Board on this question. During its deliberations in this case, the Board examined the relevance of section 98(3) to the instant case. It then asked counsel to submit their arguments on this question. The Board received the parties' arguments within the specified time limit and took them into consideration.

Through the evidence adduced, the Board was made aware of the recourses exercised by the complainant following his dismissal, the decisions of the various jurisdictions involved and the respective positions of the parties before each jurisdiction. More particularly, it was informed on the last hearing day, May 29, 1990, of Mr. Marc Boisvert's interlocutory arbitral award of April 24, 1990, about which it will have more to say later.

After examining the evidence and the testimony, the Board sees no reason to deal with the merits of the complaint filed by Christian Thévenot and decides instead to apply the provisions of section 98(3) of the Code.

II

The Facts

Before going into the reasons that led to the application of the provisions of section 98(3) of the Code, it is appropriate to recall the evidence adduced.

A. The chronology of events

1. Christian Thévenot was dismissed on March 8, 1989 because he had not reported for work on Monday, March 6, 1989, at 7:30 a.m., as had been agreed to by the parties. The employer also cited the complainant's disciplinary and absenteeism record in support of its decision.
2. On March 13, 1989, the complainant filed a grievance against this disciplinary measure. Between that date and June 1, 1989, the complainant filed a total of six grievances, all related in one way or another to the disciplinary action of March 8, 1989.
3. On March 17, 1989, the complainant filed a complaint with the Quebec Occupational Health and Safety Commission alleging unlawful dismissal. According to Mr. Thévenot, his dismissal on March 8, 1989 is unlawful because it occurred within six months of his sustaining an employment injury, which he suffered on or about February 15, 1989.
4. On June 1, 1989, the Occupational Health and Safety Commission granted the complaint and ordered that Mr. Thévenot be reinstated.

In its decision, the Commission dismissed the employer's objection to its constitutional jurisdiction. The employer claimed that it is a federal work, undertaking or business and as such is not subject to Quebec's Act respecting Industrial Accidents and Occupational Diseases.

That decision was filed with the office of the prothonotary of the Superior Court a few days later and thus acquired the force of an executory judgment of that Court.

5. In July 1989, the employer filed a motion in evocation in the Superior Court of Quebec in which it asked that the Commission's decision be declared null and void since that body was without constitutional jurisdiction.
6. In the meantime, in May 1989, grievance arbitrator Marc Boisvert was named by the parties to hear the grievances filed by the complainant, including the grievance of March 13, 1989.

As soon as the arbitration proceeding began, the employer objected to the arbitrator's jurisdiction to deal with the complainant's grievances on their merits. The employer relied on section 32 of the Act respecting Industrial Accidents and Occupational Diseases. It argued that Mr. Thévenot's decision to file a complaint with the Occupational Health and Safety Commission precluded his recourse to the grievance and arbitration procedure under the collective agreement.

Section 32 of the Act respecting Industrial Accidents and Occupational Diseases reads as follows:

"32. No employer may dismiss, suspend or transfer a worker or practise discrimination or take reprisals against him, or impose any other sanction upon him because he has suffered an employment injury or exercised his rights under this Act.

A worker who believes that he has been the victim of a sanction or action described in the first paragraph may, as he elects, resort to the grievance procedure set down in the collective

agreement applicable to him or submit a complaint to the Commission in accordance with section 253."

7. Arbitrator Boisvert heard the parties in January 1990 on the preliminary question of jurisdiction. It was then agreed that the arbitrator would render an interlocutory decision on that matter, which he did on April 24, 1990. According to the arbitrator's interpretation of section 32 of that Act, the complainant's decision to submit a complaint to the Occupational Health and Safety Commission precluded his hearing the complainant's grievances on their merits, the complainant having thus relinquished his right to resort to the grievance and arbitration procedure.
8. However, the arbitrator refused to dismiss the complainant's grievances outright and suspended the hearing on the merits of the grievances. In effect, he decided that if the ordinary courts of law confirm the constitutional jurisdiction of the Occupational Health and Safety Commission, the validity of the reinstatement order of June 1, 1989 will be confirmed. If, however, this jurisdiction is not confirmed, the grievance arbitrator can then proceed to hear the grievances and deal with them on their merits, in accordance with the provisions of the collective agreement. The arbitrator states the following in this regard:

"This is why I believe there is no need to dispose immediately of the grievances filed by the complainant. I also believe it is necessary to suspend the hearing into these grievances until there is a final resolution of the question of whether section 32 applies to the complainant. If the court grants the Employer's motion in evocation and concludes that section 32 does not apply to the business operated by the Employer, the grievances should then be heard. If it does not, the grievances should be dismissed since the

Commission would have exclusive jurisdiction to dispose of the matter at issue."

(translation)

9. On February 15, 1990, Mr. Thévenot filed with the Canadian Human Rights Commission a complaint alleging that the employer had discriminated against him on the ground of a physical disability. The Commission investigated this complaint.

This is where things stood at the end of May 1990 when the hearings before the Board concluded.

B. Mr. Thévenot's testimony

At the hearings, the complainant testified twice: once at the employer's request and during presentation of his own evidence. He questioned the manner in which the employer interpreted and applied certain provisions of the collective agreement in the days preceding his dismissal. He alleged, for example, that in February 1989, the employer applied the provisions of memorandum of understanding no. 3 (work clothes - care) differently than it had applied them prior to this time. The complainant thus believed that this provision of the collective agreement was applied more strictly to him than it is normally applied to the other employees. The complainant also questioned the manner in which the employer set his hours of work for the period commencing on March 6, 1989. Setting or altering the complainant's hours of work is another bone of contention between the complainant and his employer. In short, argued the complainant, the manner in which the employer applied and interpreted the collective agreement showed that it

dismissed him without just and sufficient cause. It was this conduct that gave rise to the complainant's grievances.

The complainant also gave testimony on his union activities and duties between 1981 and the date of his dismissal. Besides participating on three occasions in negotiations of a collective agreement for the ground employees, Mr. Thévenot served at various times as union steward, member of the safety and health committee, member of the various committees established when Québecair was sold in 1986, and member of the grievance committee, a position he occupied when he was dismissed. According to the complainant, his repeated participation in union activities is the reason why the employer terminated his employment.

III

The Decision

Hearing the evidence and arguments gave the Board a good understanding of the nature of the dispute between the parties and of the allegations advanced by both sides in support of their claims.

This hearing shed light on how the grievance and arbitration procedure has been administered to date. The Board notes in this regard that the complainant filed, within the prescribed time limits, a grievance against a measure that, in his opinion, also constitutes an unfair labour practice prohibited by the Code.

The Board believes that the grievance and arbitration procedure provided for in the collective agreement, in particular the powers an arbitrator has with respect to

remedies in cases involving disciplinary action, meets the test applied by the Board in such a case.

Having regard to the circumstances of this case, the Board decides that the questions raised in the instant case are within the jurisdiction of the grievance arbitrator. In so doing, the Board endorses the principles and criteria recently enunciated with respect to the interpretation and application of section 98(3).

In Ottawa-Carleton Regional Transit Commission (1990), as yet unreported CLRB decision no. 805, the complainant alleged that he was disciplined for refusing to operate a bus he considered unsafe. In considering a complaint filed pursuant to section 94(3)(a), the Board decided not to hear and deal with it on its merits because the matters at issue were already the subject of grievances. The Board said this:

"... The Board also decided that, since all the other issues before it were already the subject of grievances filed by the union alleging violations of the collective agreement between the parties - or could be made the subject of grievances - it would refuse to hear and determine these matters because it would be more appropriate for them to be dealt with under the grievance and arbitration provisions of that collective agreement. The Board therefore announced at the hearing that it had decided to dismiss the complaints and close the files. These reasons are intended to confirm briefly in writing why the Board took these steps."

(page 2)

Later in the decision, it added the following:

"... arbitration would probably offer a broader scope for determination of the justice or injustice of this treatment than would a proceeding before the Board. In the case of the suspension, for example, an arbitrator would be able to decide whether or not it was inappropriate on very broad grounds; the Board on the other hand would be able to conclude that it was inappropriate only if the quorum could identify

'anti-union animus' as being one of the factors motivating the employer to impose the suspension. It was also pointed out at the hearing that 'anti-union animus' is not something which is readily identifiable in cases of this kind; employer action with which a union disagrees can rarely be classified as flowing from 'anti-union animus', particularly where the collective bargaining relationship between the parties is of long standing. It may, however, be a violation of the collective agreement. Thus it will be capable of being rectified through the grievance process and arbitration. Practical considerations ought to persuade a union that resort to arbitration is preferable to a proceeding before the Board under such circumstances - where the matter 'could be referred by the complainant pursuant to a collective agreement to an arbitrator or arbitration board', to use the terminology of section 98(3)."

(pages 9-10)

Two other recent Board decisions deal with the application of section 98(3). In Canada Post Corporation (1989), as yet unreported CLRB decision no. 729, the Board, after recalling that section 57 of the Code imposes on the parties to a collective agreement the obligation to negotiate a dispute resolution procedure without a work stoppage and that the parties are responsible for using this procedure wisely, stated the following:

"... It is our view that this Board ought not to interfere with this phase of the free collective bargaining process by making itself available as an alternate forum thereby allowing the parties to abrogate their responsibilities. Where there is a collective bargaining regime in place, it seems to us that the Board should deal only with complaints from the parties where there are circumstances going beyond the scope of the collective agreement which would warrant the Board's intervention. This is certainly the approach being taken by the Courts who have been showing more and more deference to the arbitration process over the past decade - see St. Anne Nackawic Pulp and Paper Co. Ltd. and Canadian Paper Workers Union, Local 219, [1986] 1 S.C.R. 704."

(pages 5-6)

In that case, the Board reviewed the principles developed in its past decisions concerning the application and

interpretation of section 98(3) (see Air Canada (1975), 11 di 5; [1975] 2 Can LRBR 193; and 75 CLLC 16,164 (CLRB no. 45); and Bell Canada (1977), 20 di 356; [1978] 1 Can LRBR 1; and 78 CLLC 16,126 (CLRB no. 97)). According to the Board, this examination leads to the following conclusion: the full application of these principles almost always requires the Board to hear and determine the complaints made to it. Relying on this observation, the Board decided that in the future it would be more deferential to the dispute resolution procedure negotiated by the parties to the collective agreement.

In the instant case, the Board adopts this approach, but wishes to point out that its power to deal with whether to hear and deal with a complaint on its merits or refer it to arbitration remains intact. It must exercise this power after examining all the circumstances of the case under consideration.

In Canada Post Corporation (1990), as yet unreported CLRB decision no. 800, the Board also dealt with this question. Here, it developed a test for determining whether the Board should apply section 98(3) of the Code. It described this test as follows:

"Is there in this case a genuine statutory right that the Board must define or reassert? After having reviewed the evidence and the parties' submissions and on the basis of the evidence, we find that there is none."

(page 15; emphasis added)

Having examined the evidence heard at the public hearings, the Board then made the following finding:

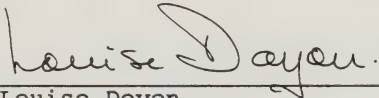
"For all these reasons, the Board finds that making a determination on the merits of this complaint would serve no sound labour relations purpose. This complaint would be better dealt

with via the arbitration provisions applicable to the parties pursuant to section 98(3) of the Code. This complaint is accordingly dismissed."

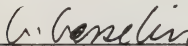
(page 17; emphasis added)

The Board agrees in the instant case with this manner of interpreting and applying section 98(3) of the Code. It does not believe in this instance that it should intervene to define or reassert a fundamental right under the Code. The Board is therefore exercising its power under section 98(3) of the Code and ensuring that the decisions it renders are in keeping with the sound administration of justice.

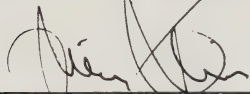
For all these reasons, the complaint is dismissed.



Louise Doyon
Vice-Chair



Ginette Gosselin
Member of the Board



François Bastien
Member of the Board

ISSUED at Ottawa, this 1st day of November 1990.

CCRT/CLRB - 827

information

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Summary

FISH PLANT WORKERS UNION OF
NEWFOUNDLAND, LOCAL 2201, OF THE
UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION ON BEHALF OF
GERALD CHILDS ET AL., COMPLAINANTS;
NORTHERN CRUISER LIMITED, OSA MARINE
SERVICES CANADA LIMITED, AND NAUTILUS
MARINE CONSULTANTS LIMITED,
RESPONDENTS.

Board Files: 745-3585
745-3712
745-3723

Decision No.: 828



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Résumé de Décision

FISH PLANT WORKERS UNION OF
NEWFOUNDLAND, SECTION LOCALE 2201 DU
SYNDICAT INTERNATIONAL DES
TRAVAILLEURS UNIS DE L'ALIMENTATION
ET DU COMMERCE, AGISSANT AU NOM DE
GERALD CHILDS ET AUTRES, PLAIGNANTS;
NORTHERN CRUISER LIMITED, OSA MARINE
SERVICES CANADA LIMITED, ET NAUTILUS
MARINE CONSULTANTS LIMITED, INTIMÉS.

Dossier du Conseil: 745-3585
745-3712
745-3723

N° de Décision: 828

These reasons deal with a complex
series of unfair labour practice
complaints in which the union alleged
that Gerald Childs and some 16 other
crew members of the M.S. Northern
Princess had their employment
terminated at various times between
December 30, 1989 and July 19, 1990
because they had exercised their
rights under the Code. The union also
alleged that the employer, Northern
Cruiser Limited, had attempted to
intimidate the employees and had
interfered with their right to
participate in the lawful activities
of the trade union of their choice.

The complaints were allowed. In these
reasons, the Board reviewed briefly
the legislative and policy schemes
within which complaints of this nature
are dealt with. The Board also
touched upon the law regarding who is
the true employer when labour is
contracted in from an agency.

The Board took appropriate remedial
steps to correct the wrongs inflicted
by the employer's unlawful acts
including reinstatement of employees
with compensation for lost wages. The
Board also ordered that the employees
be given priority for work aboard the
Northern Princess when an ongoing
strike comes to an end.

Les présents motifs traitent d'une
série de plaintes de pratiques
déloyales de travail complexes par
lesquelles le syndicat a allégué qu'il
avait été mis fin à l'emploi de Gerald
Childs et de quelque 16 autres membres
de l'équipage du M.S. Northern
Princess entre le 30 décembre 1989 et
le 19 juillet 1990 parce que ces
derniers avaient exercé les droits que
leur conférait le Code. Le syndicat
a également allégué que l'employeur,
Northern Cruiser Limited, avait tenté
d'intimider les employés et s'était
ingéré dans leur droit de participer
à des activités licites du syndicat
de leur choix.

Les plaintes ont été accueillies. Le
Conseil a revu brièvement les
dispositions législatives et les
politiques relatives au traitement de
ce genre de plaintes. Il a également
examiné le droit en ce qui a trait à
la question de savoir qui est
l'employeur réel lorsque la main
d'oeuvre vient d'une agence.

Le Conseil a pris les mesures de
redressement nécessaires pour réparer
les injustices causées par les mesures
illicites de l'employeur; il a
ordonné entre autres la réintégration
des employés et une indemnité
équivalente aux salaires perdus. Le
Conseil a également ordonné que les
employés se voient donner la priorité
pour tout travail à bord du Northern
Princess lorsque la grève alors en
cours prendrait fin.

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Canada
Labour
Relations
Board

Conseil
Canadien des
Relations du
Travail

Reasons for decision

Fish Plant Workers Union of
Newfoundland, Local 2201, of the
United Food and Commercial
Workers International Union on
behalf of Gerald Childs et al,

complainant,

Northern Cruiser Limited,

OSA Marine Services Canada
Limited, and

Nautilus Marine Consultants
Limited,

respondents.

Board Files: 745-3585
745-3712
745-3723

The Board was composed of Vice-Chairman Hugh R. Jamieson,
and Members Robert Cadieux and Michael Eayrs.

The reasons for this decision were written by Vice-
Chairman Hugh R. Jamieson.

Appearances:

Messrs. Dana Lenehan and Paul Burgess, for the Fish Plant
Workers Union of Newfoundland, Local 2201, UFCW;
Mr. James P. Adams, for Northern Cruiser Limited; and
Messrs. William Collins and Jerome Kennedy, for OSA
Marine Services Limited and Nautilus Marine Consultants
Limited.

I

These reasons deal with a complex series of unfair labour
practice complaints which were filed with the Board by
the Fish Plant Workers Union of Newfoundland, Local 2201
of the United Food and Commercial Workers International
Union (the union or UFCW) on behalf of:

Gerald Childs
Leonard Lynch
Eric Phillips
Glen Riggs
Fabian Childs
Kevin Moores
Roy Hiscock
Reg Verge
Mary Rachel Doyle
Minnie Applin
Lucien Jones
Camille Lavallee
Lionel Lavallee
Emily Jane Taylor
Wayne Simms
Walter Coombs
Ben Strickland

These persons all worked aboard the vessel "M.S. Northern Princess" during the 1989-90 shipping season and were affected by an application for certification which was filed by the union on September 18, 1989. Those proceedings resulted in the Board certifying the union as the bargaining agent for a bargaining unit described as:

"all employees of Northern Cruiser Limited, working on board the vessel M.S. Northern Princess, excluding captain, first mate, chief engineer, and cadet."

The date of the certification order was December 8, 1989 (Board file 555-3004).

As the certification order indicates the Northern Princess is operated by Northern Cruiser Limited (Northern Cruiser or the employer). The sole business of Northern Cruiser is the operation of the Northern Princess as a passenger and vehicle ferry service between St. Barbe, Newfoundland and Blanc Sablon, Quebec. The Northern Princess is capable of carrying 50 - 52 vehicles and up to 250 passengers. It operates during a season extending from about May to January of the following year, ice conditions permitting. The peak season for tourist traffic is

July and August during which the ferry makes as many crossings as four per day. Each crossing takes about 1 hour and 40 minutes. In the quieter months of the season the ferry makes two crossings per day with these being reduced to a single crossing at times. The number of persons working on board the Northern Princess fluctuates with the traffic, there being a regular full season core of employees and a seasonal group supplementing the regular crew during the busy months.

In the off-season the Northern Princess is berthed at St. John's, Newfoundland where it is crewed by a skeleton maintenance staff through January to March. Usually, during March into April each year the crew is recalled in order of priority to ready the vessel for its return trip to St. Barbe for the commencement of the season.

Northern Cruiser's head office is at St. John's, Newfoundland. Its Managing Director Mr. Arthur Puddister and his brother Lou Puddister play a prominent role in these proceedings and their names will come up often in these reasons. We shall also be mentioning Captain Frank Puddister (now deceased) who ran the Puddisters' business before a serious illness rendered him incapable of doing so in the fall of 1989. We should also mention that the Puddister family own and operate other corporate entities which are involved in the shipping industry. During these proceedings there were references to other Puddister-owned vessels that crew members had been transferred to and from.

The other two respondent companies named in these complaints, OSA Marine Services Limited (OSA), and Nautilus Marine Consultants Limited (Nautilus) can best be described for the purposes of these proceedings as payroll management and crewing agencies. In the spring of 1990 Northern Cruiser entered into

contracts with OSA and Nautilus to supply the crew for the Northern Princess and to manage its payroll. OSA was to provide the licensed crew or officers for the vessel other than the Captain, and Nautilus was to provide the unlicensed crew. Captain Frank Euler represented both OSA and Nautilus in their dealings with Northern Cruiser and the crew of the Northern Princess.

The sections of the Code which were alleged to have been violated are 24(4), 50(b), 94(1)(a), 94(3)(a)(i), 94(3)(a)(vi), 94(3)(c), and 94(3)(e). In very general terms the thrust of the complaints can be described as follows:

Board file 745-3585 filed March 19, 1990

In this complaint the UFCW alleged that Northern Cruiser had contravened the Code by terminating the employment of Gerald Childs because of the prominent part he played in organizing the crew of the Northern Princess and persuading them to become members of the union. The union also made other allegations about anti-union activities of the employer which the union claims were aimed at discouraging the employees from continuing with their quest for collective bargaining.

Board file 745-3712 filed July 27, 1990

This complaint was filed on behalf of employees Lynch, Phillips, Riggs, Fabian Childs, Moores, Hiscock, Verge, Doyle and Applin, none of whom had been recalled for the 1990 shipping season. OSA was named in this complaint as the second respondent. The union alleged that the failure to recall these nine crew members was anti-union motivated and that it also constituted a prohibited change in the terms and conditions of employment contrary to section 24(4) and 50(b). In regards to the section 50(b) portion of this complaint, Ministerial

Consent which is required under section 97(3) of the Code was obtained by the union on August 16, 1990.

Board file 745-3723 filed August 13, 1990

This complaint was filed on behalf of employees Jones, Camille Lavallee, Lionel Lavallee, Taylor, Simms, Coombs and Strickland. Nautilus was added to the proceedings in this complaint as the third respondent. Here, the union alleged that these eight employees had been terminated unlawfully while they were participating in a lawful strike.

Northern Cruiser, OSA and Nautilus denied the allegations against them and hearings were conducted into these complaints at St. John's on August 15-19, September 17-21, and October 15-19, 1990.

During the three weeks of hearings the Board heard testimony on behalf of Northern Cruiser, OSA and Nautilus, the UFCW and by some of the affected employees. The Board also heard about six hours of argument by counsel for the parties. Following consideration of all of the evidence and the positions taken by the parties, the Board has concluded that throughout the relevant period of time covered by these complaints the true employer of the affected employees working on board the Northern Princess was and is Northern Cruiser. Further, the Board also concluded that the circumstances surrounding these complaints reveal a classic example of an employer that is determined to resist the collective bargaining principles enshrined in the Code. To that end, the employer took every available opportunity under the guise of legitimate entrepreneurial discretion to undermine the UFCW, to erode the bargaining unit and to thwart the attempts by the employees to exercise their fundamental freedoms and rights under the Code

to select a bargaining agent of their choice and to opt for collective bargaining.

II

Before dealing with the particular facts and circumstances which led us to the foregoing conclusions let us first set the scene by briefly restating some well established principles which are fundamental to the legislative scheme of the Code. We shall also touch upon some policies adopted by the Board to ensure that rights accorded employees under Part I of the Code have some meaning.

Section 8 of the Code provides:

"8. (1) Every employee is free to join the trade union of his choice and to participate in its lawful activities.

(2) Every employer is free to join the employers' organization of his choice and to participate in its lawful activities."

In Sedpex Inc. (1985), 63 di 102 (CLRB no. 543) the Board traced the evolution of the freedom of association which is contained in section 8 of the Code:

"The fundamental purpose of Part V (now Part I) of the Canada Labour Code is to protect and facilitate the 'freedom of association' upon which our system of collective bargaining is founded. Section 110 (now section 8) of the Code provides:

'110.(1) Every employee is free to join the trade union of his choice and to participate in its lawful activities.

(2) Every employer is free to join the employers' organization of his choice and to participate in its lawful activities.'

In Cominco Ltd. (1980), 40 di 75; [1980] 3 Can LRBR 105; and 80 CLLC 16,045 (CLRB no. 240), the Board traced today's legislative policy as expressed in the Preamble to Part V (now Part I) of the Code,

back to July 11, 1918, when the freedom to organize for collective bargaining purposes first received national government expression in P.C. 1743:

'The Minister, therefore, recommends that the Governor-in-Council declare the following principles and policies and urge their adoption upon both employers and workmen for the period of the war.
...

2. That all employees have the right to organize in trade unions, and this right shall not be denied or interfered with in any manner whatsoever, and through their chosen representatives should be permitted and encouraged to negotiate with employers concerning working conditions, rates of pay, or other grievances.

3. That employers shall have the right to organize in associations of groups, and this right shall not be denied or interfered with by workers in any manner whatsoever.

4. That employers should not discharge or refuse to employ workers merely by reason of membership in trade unions or for legitimate trade union activities outside working hours.

5. That workers in the exercise of their right to organize shall use neither coercion nor intimidation of any kind to influence any person to join their organizations or employers to bargain or deal therewith. ...

The Committee concur in the foregoing recommendations and submit the same for Your Excellency's approval.'

(pages 77-78; 107-108; and 718; emphasis added)

Some sixty four years later the freedom to associate was included as a fundamental freedom that is guaranteed by section 2(d) of the Canadian Charter of Rights and Freedoms (Constitution Act, 1982):

'1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:

...

(d) freedom of association.'

(pages 109-110)

To give some meaning to the basic freedoms contained in section 8 of the Code the legislators prohibited certain employer actions by enacting the following sections of the Code:

"94. (1) No employer or person acting on behalf of an employer shall

(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union;"

* * * *

"94. (3) No employer or person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation, or administration of a trade union,

...

(vi) has participated in a strike that is not prohibited by this Part or exercised any right under this Part;

(b) impose any condition in a contract of employment that restrains, or has the effect of restraining, an employee from exercising any right conferred on him by this Part;

(c) suspend, discharge or impose any financial or other penalty on an employee, or take any other disciplinary action against an employee, by reason of his refusal to perform all or some of the duties and responsibilities of another employee who is participating in a strike or subject to a lockout that is not prohibited by this Part;

...

(e) seek, by intimidation, threat of dismissal or any other kind of threat, by the imposition of a financial or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of a trade union or to refrain from

- (i) *testifying or otherwise participating in a proceeding under this Part,*
 - (ii) *making a disclosure that the person may be required to make in a proceeding under this Part, or*
 - (iii) *making an application or filing a complaint under this Part;"*
- (emphasis added)

Also, relevant to these complaints, sections 24(4) and 50(b):

"24.(4) Where an application by a trade union for certification as the bargaining agent for a unit is made in accordance with this section, no employer of employees in the unit shall, after notification that the application has been made, alter the rates of pay, any other term or condition of employment or any right or privilege of such employees until

(a) the application has been withdrawn by the trade union or dismissed by the Board, or

(b) thirty days have elapsed after the day on which the Board certifies the trade union as the bargaining agent for the unit,

except pursuant to a collective agreement or with the consent of the Board."

* * * * *

"50. Where notice to bargain collectively has been given under this Part,

...

(b) the employer shall not alter the rates of pay or any other term or condition of employment or any right or privilege of the employees in the bargaining unit, or any right or privilege of the bargaining agent, until the requirements of paragraphs 89(1)(a) to (d) have been met, unless the bargaining agent consents to the alteration of such a term or condition, or such a right or privilege."

Further, to ensure that the Board has access to the motives behind employer actions, section 98(4) places a burden on employers to prove that a violation of section 94(3) has not occurred:

"98.(4) Where a complaint is made in writing pursuant to section 97 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 94(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party."

To bolster the foregoing legislative scheme and to further reduce the opportunity for employers to interfere with employees' rights to opt for collective bargaining and their right to freely select a bargaining agent of their choice, the Board has adopted regulations which equate membership in a trade union with an expression of a wish to be represented by the union for the purposes of certification proceedings (see Regulation no. 26). To protect the identity of employees who have joined trade unions, Regulation 28 makes all documents filed during the certification process pertaining to membership in a trade union confidential for the Board's eyes only.

In practice the Board relies upon proof of membership in a trade union as of the date of the filing of an application for certification to gauge the support for a union amongst the employees in the bargaining unit for which the union is seeking bargaining rights. Except where a vote is mandatory under the Code, the Board seldom resorts to a vote to satisfy itself of employee wishes in certification proceedings. This practice and policy of the Board and the reasons therefor are set out at some length in Sedpex Inc., supra; we need not repeat them here. Suffice it to say that what the Board is saying is that wishes of employees vis-à-vis their selection of a bargaining agent for the purposes of Part I of the Code are none of the employer's business. (In this regard see also K.D. Marine Transport Ltd. (1982), 51 di 130; and 83 CLLC 16,009 (CLRB no. 400)).

By its very nature collective bargaining legislation necessarily restricts the ability of employers to manage their business as they see fit. When employees opt for collective bargaining the previously unfettered right of the employer to deal with the employees as individuals and to decide unilaterally about things like conditions of employment and remuneration is curtailed. It is only natural for some employers to react negatively when employees exercise their rights under the Code. Unfortunately, however, some employers' reaction extends to a total rejection of the collective bargaining system and this manifests itself into violations of the Code.

Such employer reaction takes many forms; at times it can be ill-advised, clumsy and thus easily identified. At other times it is well planned, sophisticated and discreetly camouflaged amidst a series of otherwise apparently legitimate business manoeuvres. These are much more difficult to detect as there seldom is direct evidence about the employer's true motives. To counter such moves by employers the Board has adopted the following "proximate cause" policy which was reiterated recently in Kleysen Transport Ltd. (1990) unreported CLRB decision no. 817.

"In a recent decision, Office and Technical Employees' Union Local 15, on behalf of Michael Cooper (1990), unreported Board decision no. 775 at pages 5-6, the Board reviewed its approach to complaints under section 94(3)(a)(i) of the Code:

'In this type of complaint there is seldom direct evidence showing that an employer's actions are motivated by anti-union sentiments. The only party that usually has knowledge of why certain actions were taken is the employer itself. For these reasons the burden of proof is shifted to the employer by section 98(4) so that it is the employer who must satisfy the Board that its conduct was not anti-union motivated:

...

The Board's approach to complaints under section 94(3)(a)(i) has been well documented.

Anti-union motives need only be a proximate cause for employer action to be found to be a violation of section 94(3)(a)(i) of the Code. This policy was summarized by the Board in Air Atlantic Limited (1986), 68 di 30; and 87 CLLC 16,002 (CLRB no. 600):

'The law on the subject of discrimination against employees for having exercised rights under the Code is well settled. If a decision by an employer to take any of the actions described in section 184(3)(a) (now section 94(3)(a)) against an employee has been influenced in any way by the fact that the employee has, or is about to exercise rights under the Code then the employer's actions will be found to be contrary to the Code. Anti-union motives need only be a proximate cause for an employer's conduct to run afoul of the Code:

'It is a rare experience for labour relations boards to hear an employer who cannot advance a justification for his act - e.g. failure to report to work one day, an act of insubordination to a superior, or merely a re-evaluation of the employee's performance which showed he did not maintain the standard desired. They may be proper motivations for employer actions but experience shows they are often relied upon around the time the employee is seeking to exercise or has exercised his right under section 110(1) (now section 8(1)).

To give substance to the policy of the legislation and properly protect the employee's right, an employer must not be permitted to achieve a discriminatory objective because he coupled his discriminatory motive with other non-discriminatory reasons for his act.

For these reasons, if an employer acts out of anti-union animus, even if it is an incidental reason, and his act is contemplated by section 184(3) (now section 94(3)), he will be found to have committed an unfair labour practice.'

(Yellowknife District Hospital Society (1977), 20 di 281; 77 CLLC 16,083, at pages 284-285 and 16,549)

(Emphasis added)'"

It was against that background of legislative and policy schemes that the Board considered the instant complaints.

III

Turning to the facts, what we intend to do is to zero in on the happenings which caused us to conclude that Northern Cruiser embarked on a deliberate and premeditated course of action which was intended to discourage the employees from continuing with the exercise of their rights to opt for collective bargaining. Clearly, it was the employer's goal to run its business union-free. We use the words "to discourage the employees from continuing with the exercise of their rights" because the employer's unlawful actions began only after it was notified by the Board that the union had applied for certification. By that time, in September 1989, the majority of the employees on board the Northern Princess had already joined the union.

According to the testimony of Gerald Childs, who was the bosun on the Northern Princess, he and the second engineer, Gordon White, came up with the idea of being represented by a trade union. This was around June 1989. Apparently there was dissatisfaction amongst the crew over, among other things, the long hours they had to work during the summer months. Gordon White took the first step by contacting a union but nothing came of this. Gordon White was then transferred to another vessel in the Puddister fleet. Gerald Childs then contacted the UFCW and, after a few meetings and some persuasive organizing by Childs, the majority of the crew signed cards and the union filed its application for certification with the Board.

In the ordinary course of processing an application for certification the Board notifies the employer and requests certain information about the affected employees. One of the instructions to the employer is to require that a notice to employees be posted at the workplace. This notice remains posted for at least seven days following which the employer signs a certificate of posting which is returned to the Board. Naturally the Board supplies the completed notice to employees which is accompanied by a copy of the application.

When Northern Cruiser received these documents from the Board Mr. Arthur Puddister used the opportunity presented by the notice to employees to attend at the Northern Princess to meet with the employees. There he held three meetings; one with the officers, which included Gerald Childs, and the other two with the unlicensed crew - one with the seamen and one with the oilers and stewards. At these meetings Mr. Puddister expressed his disappointment about the crew going to the union and he told the officers that Northern Cruiser would be taking the position that they were management persons and should be excluded from the bargaining unit. He also told the crew that this was only an application and that he did not know if it would go through. He added that in the meantime, all wages were frozen because of the application and that as far as the company was concerned it was business as usual.

To the uninitiated, these meetings may have the appearance of being an innocent exercise of management prerogatives but we are satisfied that this personal contact by Arthur Puddister was intended to carry an implicit message to the employees that Northern Cruiser wanted no part of collective bargaining and that they had better think carefully about their futures. Rather than go to the expense and time for a personal visit to

the Northern Cruiser, the employer could just as easily have sent the notice to employees to the vessel's captain for him to post. This was the usual way that the employer communicated with the crew.

There was one other aspect of this posting of the notice incident that raised credibility issues during the hearing. Besides posting the official notices supplied by the Board the union alleged that Arthur Puddister also posted a petition for employees who opposed the union to sign. Arthur Puddister vehemently denied this. Several employees testified about seeing this petition and, notwithstanding counsel's skillful cross-examination which caused some confusion in their minds about what papers were posted almost one year ago, we are satisfied that there was indeed a petition of some sort posted which in itself was an invitation for employees to oppose the union. No such petition was ever filed with the Board, probably because no one signed it.

That was not the only visit to the vessel by Arthur Puddister; he returned about seven days later under the guise of following the Board's instructions to remove the notice to employees. This could surely have been done by the Captain. Again, Arthur Puddister used this opportunity to speak to the crew, in particular the officers with whom he met individually for about 10-15 minutes.

Gerald Childs was one of those spoken to and it was at this meeting that Arthur Puddister informed Childs that the bosun's position would be eliminated the following year. In this regard, Arthur Puddister testified that when his father, Captain Frank Puddister, ran the operation he did it in an informal way, he was not one for rules and regulations. Now that his father had taken ill and he, Arthur, was running the

show he had decided there would be changes. One of these changes was to ensure that the officers were properly licensed. At that time there was only the Captain and the 1st Mate with the necessary papers to stand a watch. A vessel the size of the Northern Princess required a 2nd Mate who could also stand a watch. Arthur Puddister said that he wanted Gerald Childs to attend the Marine College to obtain his watch-keeping certificate and become the 2nd Mate.

Gerald Childs said that he had tried to upgrade his qualifications in 1982 or 1983 and had not been able to handle the course. He said that Arthur Puddister knew this and felt that the suggested upgrading course was just a way to get rid of him. During a third visit to the Northern Princess by Arthur Puddister, Gerald Childs said he met him on the crew deck where he made it clear to Mr. Puddister that he was not going on a watch-keeping course. We shall return to the Childs' upgrading incident later in these reasons.

Before moving on we should mention here again that we are satisfied that Arthur Puddister's second and third visits to the Northern Princess, although couched as official business trips, were no more than pre-planned attempts to influence the employees to put a stop to their union activities. Much has been written by this Board about communications with employees and particularly about "captive audience" meetings staged by high profile officials of employers and the potential negative impact on employees during this extremely sensitive period of time when they first attempt to exercise their rights under the Code. Rather than delve into this whole area of the subtleties of employer interference we shall simply refer to cases such as City and Country Radio Limited, (1975), 11 di 22; [1975] 2 Can LRBR 1; and 75 CLLC 16,171 (CLRB no. 46); Canadian Imperial Bank of Commerce, Creston and St. Catharines Branches (1979),

35 di 105; [1980] 1 Can LRBR 307; and 80 CLLC 16,002 (CLRB no. 202); American Airlines Incorporated (1981), 43 di 114; [1981] 3 Can LRBR 90 (CLRB 301); Amok Ltd. (1981), 43 di 289 (CLRB no. 315); and Bank of Montreal (1985), 61 di 83; 10 CLRBR (NS) 129 (CLRB no. 518). We agree with the principles enunciated in these decisions and adopt them for the purposes of these complaints.

Northern Cruiser was obviously not content to rely only on the efforts of Arthur Puddister to influence the employees; it enlisted the services of Gordon White who, if one remembers, was initially in league with Gerald Childs in instigating union activities on the Northern Princess. In early December Mr. White was still employed by the Puddister family aboard another vessel when Arthur Puddister approached him to go to the Northern Princess to see how deep the pro-union feelings were amongst the crew. Before leaving St. John's for the Northern Princess, Gordon White met with Arthur Puddister for about an hour during which he undoubtedly received specific instructions about what to say and do. Gordon White arrived at the Northern Princess on or about December 4, 1989 using the rather lame excuse that he was delivering machinery parts. There he met with the employees, again in a captive audience scenario, and told them he was there to save their jobs. As an alternative to the union, Gordon White offered the employees an "in-house" agreement.

The employees, being aware of Gordon White's role in starting union talk aboard the vessel, gave him short shrift and sent him on his way to report to Arthur Puddister loud and clear that they were supporting the union.

Another indication of the state of the employer's mind at this time was a letter which went from Arthur Puddister to the

Captain of the Northern Princess. This letter which was dated December 4, 1989, the very day that Gordon White was on his mission of interference, speaks about the likelihood of no one having jobs the following year if Mr. Puddister could not get the support and co-operation of the crew. The letter ended by:

"The decision is not mine, I will leave it to the crew to decide the fate of us all as we all need a job, the decision is theirs.

...

P.S. The Marine Coaster operated 6 years from 1971-76; the Northern Cruiser 7 years from 1977-83; and the Northern Princess 6 years from 1984-89. When this service goes to public tender again our only chance is if I have the support of the crew."

This was clearly another attempt by Northern Cruiser to enlist the support of the captain to influence the crew to abandon the union. Captain Fudge, who was the recipient of the letter, testified that he saw it as such. He took no action and, incidentally, was not recalled for the 1990 season.

IV

Let us return now to the Gerald Childs' matter and the other employees who were either terminated or not recalled. First, we should make it clear that despite the constant denials by Arthur Puddister, we are satisfied that he did have complete knowledge of Gerald Childs' role in the union organizing campaign. For a while during the hearing there may have been some doubt about this, however, when the Gordon White episode came to light it became clear that somehow, Arthur Puddister had the full picture. It is just too much of a coincidence for Arthur Puddister to have chosen White to do his dirty work if he was really as uninformed as he claimed.

In any event, Northern Cruiser commenced a series of correspondence with Gerald Childs on December 1, 1989. This first letter reminded Childs about his conversation with Arthur Puddister in November wherein he had been told about the elimination of the bosun's job. It went on to suggest the need for Childs to upgrade his qualifications and indicated that if he failed to make an effort the employer would have no alternative but to take whatever action became necessary. This was followed by a second letter dated December 20, 1989, which informed Childs that a place had been reserved for him at the Marine Institute on a course commencing January 2, 1990. If he failed to take advantage of this opportunity there would be no position for him the following season. By this time, of course, Northern Cruiser was aware that the union had been certified.

According to Gerald Childs, he called Arthur Puddister when he received this letter and told him he was not going back to school. He then received a third letter dated December 21, 1989. It simply said:

"This is to advise you that you will be finished on the M.S. Northern Princess December 30, 1989. Back to school."

There was a lot of discussion at the hearing as to whether this letter of December 21, 1989 was notice of termination of employment. Certainly Gerald Childs took it as such and so did the Captain who signed Childs off the ship's articles. The employer took the position that Gerald Childs had quit.

We have no doubt in our minds that Gerald Childs was fired by the employer and that the underlying reason was his involvement with the UFCW. Here we have an employee with some 23 years of

service whom the employer has treated as being the leader of the unlicensed crew. He was paid more than the average, allowed to use officers' quarters, to eat with the officers and to remain on board during the off-season to do all sorts of handywork. Suddenly he is let go! We are satisfied that this would not have occurred "but for" his union activities. Accordingly, we find that Northern Cruiser dealt with Gerald Childs contrary to section 94(3)(a)(i) of the Code.

Moving on to the beginning of the 1990 shipping season when some of the crew members were not recalled, once again we are satisfied that this non-recall was part and parcel of the employer's continuing anti-union campaign. Having failed in its attempts to influence the employees to block the certification of the union, Northern Cruiser followed a well-worn path and set its sights on the erosion of the bargaining unit. This is a common manoeuvre by employers when they realize that they are obliged by law to commence collective bargaining with the certified bargaining agent. The goal is to undermine the union's negotiating strength. It is difficult for a union to negotiate a collective agreement if it has little or no support in the bargaining unit. If the union has lost its majority support it can hardly use its ultimate weapon effectively - i.e., the strike.

The normal seasonal shut-down and lay-off of the crew created a golden opportunity for the employer to rid itself of some of the crew. It simply did not recall nine of them when the season re-opened in May 1990. These were Leonard Lynch, 2nd engineman; Eric Phillips and Glen Riggs, oilers; Fabian Childs, steward; Kevin Moores, cook; Roy Hiscock, steward; Reg Verge, cadet/deckhand; and Mary Rachel Doyle and Minnie Applin, cleaners.

In its written replies and also through the testimony of Arthur Puddister the employer put forth reasons why each of these crew members were not recalled. We doubt if any of these reasons would hold up to justify termination of employment before any just-cause arbitrator. For example, Arthur Puddister spoke about a company policy of a one-year probation period but no one had ever been told of such a policy. Even the captain of the vessel had never heard of it. Other examples were Kevin Moores and Roy Hiscock who were not recalled on the grounds that their work was unsatisfactory. Neither of them had received any cautions or warnings that their employment was in jeopardy. It was somewhat similar with Glen Riggs who had been late for a couple of shifts. This was used as an excuse for not recalling him. Fabian Childs (son of Gerald Childs) was said to have been hired on a temporary one-season casual basis as a favour to his father. Reg Verge was not recalled because he had signed on in 1989 as a cadet. Northern Cruiser took the position that cadets were only hired for the busy months of the season as part of their training in conjunction with their courses at the Marine Institute. Normally they left the vessel in September. Also, the employer pointed out that cadets were excluded from the bargaining unit. What the employer forgot to mention was the undisputed evidence that came out later that Reg Verge had asked to remain on board as he had decided not to return to the Marine Institute in the fall. Arthur Puddister approved this request and Verge completed the season on the Northern Princess doing deckhand work.

Mary Rachel Doyle and Minnie Applin worked for several seasons on board the Northern Princess as cleaners. Arthur Puddister said the reason they were not recalled was purely economic. This was another area where he had decided to make changes after taking over the reins from his father. Rather than

continue with Doyle and Applin he thought it would save money if the crew did the cleaning. This plan was implemented at the beginning of the 1990 season. It was also the view of the employer that Doyle and Applin were independent contractors and therefore they were not employees within the meaning of the Code. We cannot agree with this last position of the employer. It is our view that both Doyle and Applin are employees within the meaning of the Code notwithstanding that they contracted to do the cleaning on the Northern Princess for \$900.00 a month. They worked regular hours, the usual employee deductions were made from their paycheque and the employer supplied all of the equipment and material that they used. The only commodity they supplied was their labour. If one looks at the material in the certification file there can be no doubt that the classification of cleaners was included in the bargaining unit which the Board certified.

Looking at the circumstances surrounding the non-recall of these nine employees, we can arrive at no other conclusion that anti-union motives were, if not the only reason, certainly an influence on the employer's decisions to discontinue their employment. In keeping with the Board's proximate cause policy, Northern Cruiser is found to have dealt with the foregoing nine persons contrary to section 94(3)(a)(i) of the Code. On second thought, however, this finding cannot affect Leonard Lynch who withdrew his complaint at the outset of the hearings. The contravention of the Code, therefore, affects the other eight named employees.

Before discussing the involvement of OSA and Nautilus we should deal briefly with two objections raised by the employer; one goes to the authority of the union to act for the individual employees, the other to the timeliness of the complaints. Dealing with the timeliness question first, the employer

suggested that these complaints were untimely as they were filed outside the ninety-day period allowed for in section 97(2) of the Code:

"97.(2) Subject to subsections (3) to (5), a complaint pursuant to subsection (1) shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint."

Northern Cruiser argued that if the employees were terminated at all, the termination took effect when they were laid off last season and that they did not have reasonable grounds to believe they would be recalled. The employer said that the complaints should have been filed within 90 days of their lay-off. We cannot accept that reasoning. It is our view that the time limits for the purposes of section 97(2) did not start until the non-recall in 1990. There was enough evidence before us about the recall of some of the crew and the non-recall of others to satisfy us that there had been changes in the recall practices from previous years. This created confusion so that it was not until the Northern Princess was ready to set sail from St. John's, Newfoundland in early May 1990 that it was abundantly clear that some of the crew were not going to be recalled. The ninety days commenced at that point in our opinion. The complaint, being filed in July 1990, is timely.

Much was made about whether the individual employees had properly authorized the UFCW to act on their behalf in accordance with Regulation no. 9:

*"9.(1) An application, reply or intervention filed with the Board shall be signed as follows:
...*

(c) where it is filed on behalf of an employee, it shall be signed by the employee himself or by a person authorized by the employee in writing to sign on his behalf."

Certainly, the union was lacking in this regard and some of the necessary written authorizations were not forthcoming until well into the hearing process. This, however, is not fatal to the complaints as these situations are correctable under section 114 of the Code:

"114. No proceeding under this Part is invalid by reason only of a defect in form or a technical irregularity."

(See A & M Transport Limited (1983) unreported Federal Court decision no. A-1129-83)

V

We are going to deal only briefly with the involvement of OSA and Nautilus in these proceedings as we are not going to make any finding against either of these respondents.

Northern Cruiser submitted that the decision to subcontract the payroll administration and crew hiring to OSA and Nautilus came after the death of Captain Frank Puddister. The Puddister family was so distraught that it was unable to cope so they took this temporary measure to ease the burden on the family. Testimony was presented to the Board by both Arthur Puddister and his labour relations adviser, Mr. Robert Giannou, that the employer was not attempting to avoid its responsibilities under the Code by way of the contracts with OSA and Nautilus because any collective agreement reached with the UFCW would affect the crew of the Northern Princess.

This was said, of course, without conceding that Northern Cruiser was the true employer. To the contrary. A lot of time and effort was taken during the hearing to convince the Board

that OSA and Nautilus were the real employers of the crew. In fact, it was Nautilus that served notice of termination on Lucien Jones, Camille Lavallee, Lionel Lavallee, Emily Jane Taylor, Wayne Simms, Walter Coombs, and Ben Strickland on July 19, 1990, after the UFCW commenced a lawful strike against Northern Cruiser. Further, according to the information in the Board's investigating officer's report, Northern Cruiser took the position that the last day of employment of Jones, the Lavalles, Taylor and Simms was January 8, 1990. This was when they signed off the vessel at the end of the previous season. Walter Coombs was on board until March 9, 1990, which was listed as his last day of employment. Northern Cruiser is clearly taking the position that these crew members were not in its employ during the 1990 season. This is further supported by other information given to the Board's Officer where it was claimed that Ben Strickland, who was the cook who replaced Kevin Moores at the start of the 1990 season, was never an employee of Northern Cruiser. These contradictions cause us to wonder about the true motives behind the contracts entered into with OSA and Nautilus.

Regardless of who was the real employer, which we will deal with shortly, the anti-union tactics of Northern Cruiser continued. The Board heard evidence from Walter Coombs that shortly after his recall in April or early May 1990 he was called into the head office where he was questioned by Arthur Puddister about whether he would stay on board if the union called a strike. Camille Lavallee testified that he was also spoken to by the Puddisters after his recall. Mr. Lavallee told the Board that Arthur Puddister picked him up at the vessel and took him to the head office where he was faced with both Arthur Puddister and Lou Puddister. He was told that no one else was going to run the Puddisters' business. He was also reminded that he had a job, he was married and to think of

his family and that the union could not tell him whether to walk off the job or not, it was entirely up to him.

What other reason could there be for these meetings with the employees who had been recalled if it was not to intimidate them into withdrawing their support for the union.

There were many other alleged attempts to interfere with the employees and to undermine the union which we heard about during the hearing. For example, Captain Euler of OSA and Nautilus was said to have told Ben Strickland, whom he thought was anti-union, to attend a certain union meeting and report back to him what was going on. Ben Strickland also said that Captain Euler told him what to say at the meeting to try to turn the employees against Gerald Childs. Then there was the alleged conversation between Ben Strickland and Lou Puddister where Mr. Puddister was said to have indicated that anyone who participated in a strike would never be back on board the Northern Princess. These conversations were not contradicted by rebuttal evidence but the credibility of Ben Strickland was attacked vigorously by counsel for all three respondents. Taking the whole scenario into account we are satisfied that on the balance of probabilities, these conversations did take place.

VI

This brings us to the question of who was the true employer of the crew of the Northern Princess during the 1990 season after OSA and Nautilus became involved. To make this determination we would look to the Board's previous decisions in Northern Television Systems Ltd. (1976), 14 di 136; and 76 CLLC 16,031

(CLRB no. 64); Nationair (Nolisair International Inc.) (1987), 70 di 44; and 19 CLRBR (NS) 81 (CLRB no. 630); and Fitzennis Cement Carriers Limited (1988), unreported Board decision no. 707. There, the Board set out and applied the criteria to be considered when labour is contracted in and a question arises as to who is the real employer. In Nationair, supra, the Board explored not only the jurisprudence of this Board but also that of other jurisdictions in Canada and the USA. What evolves from that decision is a general consensus that agencies such as OSA and Nautilus are really recruiting agencies and serve only as an intermediary between the employees and the employer. Some of the criteria to be considered are, decisive control over determination of employment conditions, control over the day-to-day performance of work, work assignments, etc. A key factor is who has the ultimate control over labour relations. When making these determinations the Board must look beyond the written contracts between the agency and the business to deal with substance, not appearances.

Applying the foregoing criteria to the facts of this case we find that Northern Cruiser is the real employer of the crew working on board the Northern Princess. Northern Cruiser has been the real employer throughout the whole relevant period of time surrounding these complaints. It is Northern Cruiser that determines the conditions of employment of the crew, controls the day-to-day work performance and undoubtedly has decisive control over labour relations. This is clearly supported by the fact that it is Northern Cruiser that is at the bargaining table with the UFCW and, on its own admission, any collective agreement arrived at will affect the crew. In our view, Captain Euler, who represented OSA and Nautilus in their dealings with Northern Cruiser and the crew, was no more than an agent of the true employer.

Turning to July 19, 1990 and the termination of the employment of Lucien Jones et al who were named in complaint no. 745-3723 while they were participating in a lawful strike which had commenced on July 16, 1990. The evidence before the Board is that Arthur Puddister spoke with Captain Euler after the strike had started and asked him what he was doing about the strike. Captain Euler decided that as employees of Nautilus the crew could not strike and, as he had no other work to assign them to he fired them for refusing to perform their duties. Once again the anti-union strategy of Northern Cruiser comes to the fore. Having failed in its attempts to intimidate the employees into not participating in a strike it now fell back on its plan that had been put in place in the spring. Now, the last piece of the jigsaw fell into place and the true underlying reason for the contracts with OSA and Nautilus became evident. If the crew were employees of OSA and Nautilus and not of Northern Cruiser they would never be in a legal strike position against Northern Cruiser.

By one means or another the employer had rid itself of practically the whole crew who had been in the bargaining unit which had been certified by the Board some seven months earlier on December 8, 1989. This surely would never have occurred "but for" the employees having exercised their rights under the Code.

Having found that Northern Cruiser is the real employer of the crew of the Northern Princess and, it being clear that the UFCW had called a lawful strike against the employer and that the employees were participating in said lawful strike, it is a prima facie breach of section 94(3)(a)(vi) to terminate the employment of the employees because they are on strike. Northern Cruiser did terminate the employment of the lawfully striking employees through the actions of its agent; therefore,

Northern Cruiser has violated that section of the Code, and we so find. This is particularly so when the terminations were motivated by anti-union animus. (see Graham Cable TV/FM (1985), 62 di 136; and 85 CLLC 16,058 (CLRB no. 529); and Rogers Cable TV (1987), 69 di 17; and 16 CLRBR (NS) 71 (CLRB no. 616)).

In summary, the Board has found that Northern Cruiser has been and still is the employer of the crew working on board the Northern Princess. The Board has also found that Northern Cruiser has violated sections 94(3)(a)(i) of the Code by terminating the employment of Gerald Childs. The same section of the Code was violated by Northern Cruiser when it failed to recall Eric Phillips, Glen Riggs, Fabian Childs, Kevin Moores, Reg Verge, Mary Rachel Doyle and Minnie Applin. And, Northern Cruiser violated sections 94(3)(a)(vi) of the Code when it terminated the employment of Lucien Jones, Camille Lavallee, Emily Jane Taylor, Wayne Simms, Walter Coombs and Ben Strickland because they were participating in a lawful strike.

It may well be that the actions of Northern Cruiser may also be a violation of the other sections of the Code as alleged by the UFCW, i.e., sections 94(1)(a) or section 50(b). However, we make no finding in this regard for the time being but we reserve the jurisdiction to do so should the need arise later.

VII

The Board has been granted broad remedial powers under section 99 of the Code to allow it to take remedial action to correct wrongs inflicted by unlawful acts by employers. These powers include:

"99.(1) Where, under section 98, the Board determines that a party to a complaint has contravened or failed to comply with subsection 24(4) or section 37, 50, 69, 94, 95 or 96, the Board may, by order, require the party to comply with or cease contravening that subsection or section and may

...

(c) in respect of a failure to comply with paragraph 94(3)(a), (c) or (f), by order, require an employer to

- (i) employ, continue to employ or permit to return to the duties of his employment any employee or other person whom the employer or any person acting on behalf of the employer has refused to employ or continue to employ, has suspended, transferred, laid off or otherwise discriminated against, or discharged for a reason that is prohibited by one of those paragraphs,
- (ii) pay to any employee or other person affected by that failure compensation not exceeding such sum as, in the opinion of the Board, is equivalent to the remuneration that would, but for that failure, have been paid by the employer to that employee or other person, and
- (iii) rescind any disciplinary action taken in respect of and pay compensation to any employee affected by that failure, not exceeding such sum as, in the opinion of the Board, is equivalent to any financial or other penalty imposed on the employee by the employer;

...

(2) For the purpose of ensuring the fulfilment of the objectives of this Part, the Board may, in respect of any contravention of or failure to comply with any provision to which subsection (1) applies and in addition to or in lieu of any other order that the Board is authorized to make under that subsection, by order, require an employer or a trade union to do or refrain from doing any thing that it is equitable to require the employer or trade union to do or refrain from doing in order to remedy or counteract any consequence of the contravention or failure to comply that is adverse to the fulfilment of those objectives."

Tempted as we may be in light of these flagrant violations of the Code to use our remedial powers to make an example of Northern Cruiser as a caution to other employers in the

community who may consider embarking on a similar course of action when their employees opt for collective bargaining, we have decided not to do so. In the interests of furthering labour relations and in the hope that the parties to these complaints can arrive at a collective agreement we shall, for the time being, take only minimal interim remedial action. We shall, however, retain jurisdiction to deal further with these matters should the need arise. We therefore order the following:

- (a) Northern Cruiser Limited is to forthwith cease from contravening the Code;
- (b) Gerald Childs is to be reinstated immediately into his employment as the bosun on the Northern Princess and he is to be paid compensation in the amount he would have earned had he been working from January 1, 1990 to the date of the strike;
- (c) Eric Phillips, Glen Riggs, Kevin Moores, Roy Hiscock, Reg Verge, Mary Rachel Doyle and Minnie Applin are to be reinstated in their employment in the same classifications which they held when they signed off the Northern Princess at the end of the 1989 season. They are also to be compensated in the amount they would have earned had they been recalled in April 1990. The compensation will be calculated from May 1, 1990 to the date of the strike;
- (d) Fabian Childs, as a temporary employee, is to be paid two months wages as if he had worked during July and August, 1990.

- (e) Lucien Jones, Camille Lavallee, Lionel Lavallee, Emily Jane Taylor, Wayne Simms, Walter Coombs and Ben Strickland are to be reinstated in their employment forthwith. As these people were on a legal strike and still are, they would not have been receiving wages, therefore, there is no compensation payable to them.

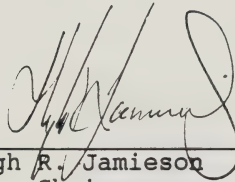
- (f) Northern Cruiser Limited and the UFCW are to return to the bargaining table under the auspices of the Federal Conciliation and Mediation Services as soon as possible after the receipt of this decision and they are to make every reasonable effort to conclude a collective agreement.

- (g) Any collective agreement arrived at shall contain a "Return-to-Work Protocol" which respects the rights of all of the employees named in these complaints. With the exception of Leonard Lynch and Fabian Childs, these employees are to have priority to return to work on the Northern Princess at the conclusion of the strike if they so desire.

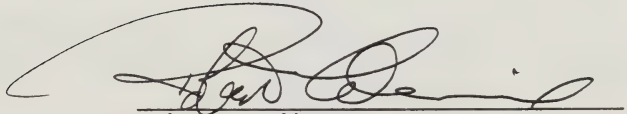
The Board will leave it to the parties to work out the return-to-work protocol but the Board retains jurisdiction over this matter should the parties fail to agree on a suitable way to get these employees back to work. (In this regard see General Aviation Services Ltd. (1982), 51 di 88; [1982] 3 Can LRBR 439; and 82 CLLC 16,181 (CLRB no. 388); and Eastern Provincial Airways Limited (1983), 54 di 172; 5 CLRBR (NS) 368; and 84 CLLC 16,012 (CLRB no. 448)).

We shall not issue a formal order at this time but the Board retains jurisdiction to do so should the need arise. Mr. John Vines, the Board's Atlantic Regional Director, is appointed to assist the parties to implement the foregoing remedies.

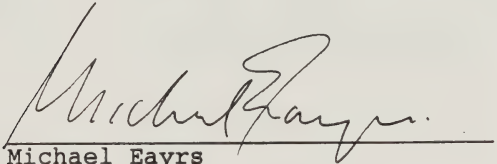
This is a unanimous decision of the Board.



Hugh R. Jamieson
Vice-Chairman



Robert Cadieux
Member



Michael Eayrs
Member

DATED at Ottawa this 6th day of November, 1990.

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SUMMARY

AMALGAMATED TRANSIT UNION,
LOCAL 1374, APPLICANT, AND
GREYHOUND LINES OF CANADA LTD.,
WESTERN CANADA, EMPLOYER.

Board Files: 530-1760
530-1873
555-3174

Decision No.: 829

RÉSUMÉ

LE SYNDICAT UNI DU TRANSPORT,
REQUÉRANT, ET GREYHOUND LINES
OF CANADA LTD., WESTERN CANADA,
EMPLOYEUR.

Dossiers du Conseil : 530-1760
530-1873
555-3174

Décision n° : 829

This case deals with two applications for review filed pursuant to section 18 of the Canada Labour Code (Part I - Industrial Relations) and one application for certification pursuant to section 24 seeking to enlarge the applicant's certification. The applicant wished to add to the existing unit of 1500 employees a group of some 60 owner-operators engaged in the pick-up and delivery of parcels.

The Board dismissed the first application for review because it held that the intended scope of the union's certification excluded owner-operators.

The application for certification was allowed. However, the Board held that the group of owner-operators did not constitute an appropriate bargaining unit. The Board allowed the second application for review and amended the initial certification by adding the owner-operators.

Demandes de révision en vertu de l'article 18 du Code canadien du travail (Partie I - Relations du travail) et demande d'accréditation en vertu de l'article 24 visant à étendre l'accréditation détenue par le requérant auprès de l'employeur. La procédure visait à ajouter à l'unité existante comprenant environ 1500 employés une soixantaine de courtiers engagés dans la cueillette et la livraison locale de colis.

Une première demande de révision a été rejetée parce que le Conseil a jugé que la portée intentionnelle de l'accréditation du syndicat excluait les courtiers.

La demande d'accréditation a été accueillie. Le Conseil a toutefois jugé que le groupe des courtiers ne constituait pas une unité appropriée. Le Conseil a donc accueilli la deuxième demande de révision et a modifié l'accréditation initiale de manière à y ajouter les courtiers.



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Reasons for decision

Amalgamated Transit Union,
Local 1374,

applicant,

and

Greyhound Lines of
Canada Ltd., Western
Canada, British Columbia,

employer.

Board Files: 530-1760
530-1873
555-3174

The Board was composed of Mr. Serge Brault,
Vice-Chairman, and Messrs. Calvin B. Davis and Michael
Eayrs, Members.

Appearances:

Mr. W.J. Johnson, for the applicant; and
Messrs. Mel. F. Belich and David J. Corry, for the
employer.

These reasons for decision were written by Mr. Serge
Brault, Vice-Chairman.

I

This decision disposes of three applications filed by the
Amalgamated Transit Union, Local 1374 (the union or ATU),
to represent a group of some 60 owner-operators working
as couriers for Greyhound Lines of Canada (Western
Division), (hereinafter the employer), in Western Canada.
It follows a hearing held in Calgary on October 23, 1990.

The union filed, at a one-year interval, two applications
pursuant to section 18 of the Canada Labour Code

(Part I - Industrial Relations) and one application for certification pursuant to section 24. The initial application - an application for review - was left dormant at the parties' request pending the outcome of other proceedings. The later applications were filed in late August of this year.

The relevant provisions of the Code read as follows:

"18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application.

...

24.(1) A trade union seeking to be certified as the bargaining agent for a unit that the trade union considers constitutes a unit appropriate for collective bargaining may, subject to this section and any regulations made by the Board under paragraph 15(e), apply to the Board for certification as the bargaining agent for the unit."

II

ATU's current certification reads as follows and covers some 1500 employees working in all of Greyhound's operations:

"all employees of Greyhound Lines of Canada Ltd., excluding its Eastern Division employees and excluding general office employees, supervisors and those above employed at the Calgary Head Office, regional managers, assistant regional managers, district managers, assistant district managers, city sales manager, depot managers, assistant depot managers, garage foremen, district supervisors, operations supervisors, charter representatives, assistant charter representatives, regional and district secretaries, and commission agents."

III

As mentioned, the group sought for inclusion is composed of some 60 couriers, all owner-operators engaged in the pick-up and delivery of parcels in the Greyhound courier department, known as GCX.

Greyhound's P&D service has been in operation for roughly a year. It differs from Greyhound's traditional parcel service in the sense that it now offers an inner-city pick-up and delivery service of parcels outside of any bus operations. Also these parcels are dispatched by Greyhound-operated trucks between British Columbia and the Prairies. This departs from Greyhound's longstanding practice of carrying parcels on board its buses, from one terminal to another as an integral part of its bus operations. Greyhound has expanded: it now transports parcels using trucks as well as vans, etc. GCX which initially started as a mere expansion of Greyhound's traditional bus transportation activities has become a full division in its own right. It has its own management, terminals, etc., albeit still closely linked to the bus transportation division.

Greyhound currently employs some 1500 employees represented by ATU and the P&D service is the only one where Greyhound uses owner-operators.

Long-haul drivers, other unionized personnel involved in the parcel division and bus operations' employees are all covered by the same collective agreement. For the purposes of its GCX division, Greyhound uses separate terminals; however, the same line managers supervise its own staff and the owner-operators.

Originally, the P&D services offered by Greyhound were contracted out to two companies that were eventually bought by Greyhound, one in Edmonton and the other in Vancouver. At the time, both companies employed owner-operators for their P&D businesses. Greyhound bought them out and continued to operate them the same way.

IV

Up until a few days before the hearing took place, Greyhound challenged the Board's constitutional jurisdiction over the owner-operators. It also challenged the employee status of owner-operators under the Code pursuant to the definition of dependent contractor found at section 3.

Later, the employer altered its position and in lengthy submissions, it recognized the Board's jurisdiction as well as the employee status of all owner-operators sought for inclusion.

For its part, ATU, which had not initially organized the owner-operators at the time of its first application, did so in the summer of 1990 and can now claim to represent the majority as its members.

The Board was fortunate enough to have both counsel file elaborate submissions before the hearing.

Our constitutional jurisdiction over the owner-operators is no longer at issue between the parties and we are indeed satisfied, as confirmed by the evidence on record,

that the couriers sought for inclusion are indeed its employees and that the GCX division is an integral part of Greyhound's interprovincial transportation undertaking.

This leaves us with the sole issue of determining whether or not these positions are covered by the existing certification held by the ATU and, in the negative, whether they should form a separate unit if the Board finds that ATU's application for certification is well founded. In order to answer this question, we need to identify the intended scope of the initial certification (see Teleqlobe Canada (1979), 32 di 270; [1979] 3 Can LRBR 86; and 80 CLLC 16,025 (partial report) (CLRB no. 198)).

A) Intended scope of the initial certification

The CGX and bus operations of Greyhound are already operated under the same collective bargaining instruments; with the exception of the owner-operators, the other employees are not distinguished for the purposes of collective bargaining on the basis of the work performed for one or the other division.

The issue we have to address is whether the fact that the employees sought for inclusion are dependent contractors rather than regular employees warrants their being considered as excluded from the original integrated bargaining scheme: were owner-operators covered by the intended scope of the initial certification delivered over 40 years ago by the Wartime Labour Relations Board?

When considering the intended scope of the initial certification, the fact that Greyhound has been in the parcel dispatching business from the outset is not per se decisive. The wording of the certificate will more than likely shed light on the issue. We are looking at positions held by owner-operators. As noted during the hearing, the current certification excludes "commission agents." Counsel for the union recognized that had these commission agents not been employees, the Board would not have needed to exclude them from the unit. Consequently, when the Board certified ATU, it found appropriate that the commission agents, while engaged in activities similar to those of other bus transportation employees, were nonetheless to be excluded from the other employees' bargaining unit.

In our view, all this shows that under the union's initial certification, employees engaged in a relationship with Greyhound that was in the nature of a dependent contractor relationship and those engaged in a master/servant relationship, to refer to traditional notions, were to be separated. This brings this panel to find that the initial certification was not intended to cover owner-operators who, in many ways, are akin to commission agents with respect to their employment relationship.

Accordingly, ATU's first application for review (530-1760) is dismissed.

B) Application for certification (555-3174) and related application for review (530-1873)

The Board's confidential report shows that ATU's application for certification is timely and that it has the support of the majority of the employees it seeks to represent.

We must now deal with the issue of appropriateness. Given our finding that owner-operators were not intended to be covered by the initial certification, does it follow that owner-operators working in the P&D service constitute on their own an appropriate bargaining unit? The answer is no. It is one thing to say that a group was not intended to be covered by a certification and it is another to say that such group constitutes an appropriate bargaining unit.

As evidenced by the record, the GCX division is operated under ATU's main collective agreement. Counsel for Greyhound argues that owner-operators should belong to a separate unit such as the existing supervisory unit that is represented by the Office and Professional Employees' International Union. He bases his argument on their unique terms and conditions of employment.

Appropriateness is not easily defined. It results from different criteria normally considered in a collective bargaining context. We are referring to the criteria that were time and again mentioned, as in the following often cited case from the British Columbia jurisdiction:

"... the Board will consider in such applications the usual factors it considers in any appropriate bargaining unit determination: administrative efficiency and convenience in

bargaining, industrial stability, lateral mobility of employees, common framework of employment conditions, community of interest amongst employees, geography, bargaining history, the structure of bargaining units generally in the particular industry, employee wishes, and so forth: see, in particular, Insurance Corp. of British Columbia, [1974] 1 Can LRBR 403, BCLRB No. 63/74."

(Westar Timber Ltd. (1987), 14 CLRBR (NS) 360 (C.-B.), page 373)

In this case we have small pockets of owner-operators spread out in Edmonton, Calgary, Vancouver, etc., who in fact do not necessarily have more common interests between themselves than with the other employees. Furthermore, after having considered the criteria listed above, we do not find it would make any labour relations sense to have them bargain in isolation. Finally, we do not see why the Board should depart from its traditional policy that broad bargaining units are more appropriate than split ones (see Canada Post Corporation (1990), as yet unreported CLRB decision no. 818). To place this group in a separate unit would artificially split Greyhound's operational unit. Their particularities can be addressed at the bargaining table along with those of other categories of employees. Finally, we do not find it would serve industrial peace to risk having such a small group be represented by a different bargaining agent.

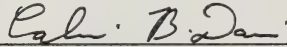
Accordingly, the Board allows the application for certification affecting the owner-operators. We find that ATU's initial certification should be amended by adding the owner-operators to the existing bargaining unit. The applicant's second application for review is therefore allowed and ATU's certificate is to be amended to read as follows:

"all employees, including owner-operators, of Greyhound Lines of Canada Ltd., excluding its Eastern Division employees and excluding general office employees, supervisors and those above employed at the Calgary Head Office, regional managers, assistant regional managers, district managers, assistant district managers, city sales manager, depot managers, assistant depot managers, garage foremen, district supervisors, operations supervisors, charter representatives, assistant charter representatives, regional and district secretaries, and commission agents."

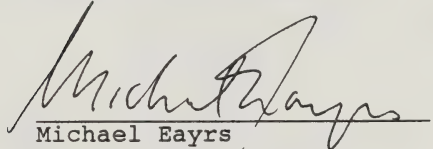
A new certificate will be issued accordingly.



Serge Brault
Vice-Chairman



Calvin B. Davis
Member of the Board



Michael Eayrs
Member of the Board

DATED at Ottawa, this 6th day of November 1990.

CLRB/CCRT - 829

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Summary

ENERGY AND CHEMICAL WORKERS UNION,
COMPLAINANT UNION, AND BRUCE R.
SMITH LIMITED, RESPONDENT EMPLOYER.

Résumé de Décision

LE SYNDICAT DES TRAVAILLEURS ET
TRAVAILLEUSES DE L'ÉNERGIE ET DE LA
CHIMIE, SYNDICAT PLAIGNANT, ET
BRUCE R. SMITH LIMITED, EMPLOYEUR
INTIMÉ.

Board Files: 745-3677
745-3700

Dossiers du Conseil: 745-3677
745-3700

Decision No.: 830

No de Décision: 830

The Energy and Chemical Workers Union complained that Bruce R. Smith Limited, a transport company based in Southwestern Ontario, had engaged in conduct and had dismissed certain employees, contrary to sections 94(3)(a) and 96 of the Canada Labour Code (Part I - Industrial Relations), in order to counter a union organizing campaign by its drivers.

Le Syndicat des travailleurs et travailleuses de l'énergie et de la chimie s'est plaint que Bruce R. Smith Limited, une compagnie de transport exploitée dans le sud-ouest de l'Ontario, avait posé des gestes et congédié certains employés en violation de l'alinéa 94(3)a) et de l'article 96 du Code canadien du travail (Partie I - Relations du travail) dans le but d'entraver la campagne de syndicalisation menée par ses chauffeurs.

After hearing the matter on October 10, 11 and 12, 1990, the Board concluded that the employer had violated these sections of the Code when the president of the company held meetings with certain employees and threatened closure of the company and loss of jobs if a union were brought into the firm. The Board also found that a factor in the dismissal of three employees was the "anti-union animus" of the employer.

Après avoir entendu l'affaire les 10, 11 et 12 octobre 1990, le Conseil a conclu que l'employeur avait enfreint ces dispositions du Code lorsque le président de la compagnie avait tenu des réunions avec certains employés et avait proféré des menaces de fermeture et de pertes d'emplois si un syndicat mettait les pieds dans son entreprise. En outre, le Conseil a jugé que la décision de l'employeur de congédier trois employés avait été motivée entre autres par un sentiment antisyndical.

The Board ordered the company to cease violating the Code and to reinstate the three fired employees and compensate them for lost wages.

Le Conseil a ordonné à l'employeur de cesser d'enfreindre le Code, de réintégrer les trois employés congédiés et de les dédommager de toutes pertes de salaire.



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Reasons for decision

Energy and Chemical
Workers Union,

complainant union,

and

Bruce R. Smith Limited,

respondent employer.

Board Files 745-3677
745-3700

The Board consisted of Vice-Chairman Thomas M. Eberlee and
Members Calvin B. Davis and Michael Eayrs.

Appearances:

Daniel Ublanski, for the Energy and Chemical Workers Union;
and

David C. Turner, for Bruce R. Smith Limited.

The reasons for decision were written by Vice-Chairman
Eberlee.

I

These files involve complaints by the Energy and Chemical
Workers Union (E.C.W.U.) that the employer, transport
company Bruce R. Smith Limited, dismissed certain employees
and engaged in conduct which violated provisions of the
Canada Labour Code (Part I - Industrial Relations) in order
to counter a union organizing campaign.

In File 745-3677, the E.C.W.U. claimed that David Cole, a
dispatcher, was fired on or about May 25, 1990, Fay
Schumacher, a truck driver, was fired on May 31, 1990, and
Kim Peter Butineau, another truck driver, was let go on or
about July 20, 1990, all in violation of sections 94(3)(a)
and 96 of the Canada Labour Code. The union also alleged

that John Smith, president of the company, held "captive audience" meetings at which employees were threatened with loss of jobs, also in contravention of sections 94(3)(a) and 96.

In File 745-3700, the union accused the employer of changing certain hours of work and conditions of employment of employees, contrary to section 24(4) of the Code, after the union's certification application had been sent to the Board.

Sections 94(3)(a), 96 and 24(4) of the Code read as follows:

94.(3)(a) No employer or person acting on behalf of an employer shall refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,

(ii) has been expelled or suspended from membership in a trade union for a reason other than a failure to pay the periodic dues, assessments and initiation fees uniformly required to be paid by all members of the trade union as a condition of acquiring or retaining membership in the trade union,

(iii) has testified or otherwise participated or may testify or otherwise participate in a proceeding under this Part,

(iv) has made or is about to make a disclosure that the person may be required to make in a proceeding under this Part,

(v) has made an application or filed a complaint under this Part, or

(vi) has participated in a strike that is not prohibited by this Part or exercised any right under this Part;

...

96. No person shall seek by intimidation or coercion to compel a person to become or refrain from becoming or to cease to be a member of a trade union.

24.(4) Where an application by a trade union for certification as the bargaining agent for a unit is made in accordance with this section, no employer of employees in the unit shall, after notification that the application has been made, alter the rates of pay, any other term or condition of employment or any right or privilege of such employees until

(a) the application has been withdrawn by the trade union or dismissed by the Board, or

(b) thirty days have elapsed after the day on which the Board certifies the trade union as the bargaining agent for the unit,

except pursuant to a collective agreement or with the consent of the Board."

A hearing was held by the Board into these matters on October 10, 11 and 12, 1990, in Toronto.

II

Bruce R. Smith Limited, is a trucking company based in Walsh, Ontario, near Simcoe, which employs over 200 persons and has a number of different transport operations and contracts, some of which are between Ontario centres and points in other provinces or in the United States. Among many other things, it hauls product for the steelmakers in Hamilton and trucks lime under contract to Stelco from the latter company's quarries near Ingersoll to its furnaces in Hamilton and Nanticoke.

The Board was told that two previous attempts by employees to organize unions at Bruce R. Smith Limited were unsuccessful. In April 1990, drivers in the "lime division" decided to make another effort. As a result of a meeting at the home of one of the drivers, they designated Fay Schumacher, who regularly hauled lime to the Stelco operations in Hamilton and Nanticoke, to find a union that would be willing to take them on. Mr. Schumacher contacted a lawyer friend, who referred him to

another lawyer, who referred him to the Canadian Labour Congress, which, in turn, gave him the names of three unions. One of the three was the Energy and Chemical Workers Union, which also happened to represent the employees of Stelco's lime quarries.

The 10 or so drivers met Brian Little of the E.C.W.U. in two contingents at meetings in Hagersville on May 9 and 11, 1990. Mr. Schumacher attended the May 9 meeting with the other four drivers who were on the same shift as he. All five signed union cards, as did the other five on May 11. This "core" of union members then proceeded to enlist other drivers throughout the company. Some were signed up for the union during breaks at a company safety meeting attended by most of the drivers in Simcoe on Saturday, May 12, 1990. Company president John Smith was also present at the meeting.

Mr. Schumacher has had several years' experience driving trucks, although he did not join this employer until July, 1989. His work pattern with Bruce R. Smith Limited involved him in two trips from the Ingersoll or Beachville quarry to Nanticoke on Lake Erie each day, plus one trip to the Hilton works in Hamilton, followed by a reloading of the truck at the quarry at the end of the day. Hours of service stretched to 15 per day and beyond.

Three days after the Simcoe safety meeting, on May 15, 1990, around 4:30 p.m., Mr. Schumacher was driving his loaded truck out of the quarry near Ingersoll when the drive shaft broke as he moved up a steep incline. He told the Board that the clutch had been "grabby" and he felt it was out of adjustment. He had reported this to the Smith maintenance people but nothing had been done by them about it.

In any case, the vehicle was repaired and Mr. Schumacher continued to drive it. He testified that the clutch was still "grabby". On May 24, with the truck in the same situation and location as on May 15, the drive shaft broke again. His mother passed away the next day so he was absent from work for several days; management called him to a meeting on May 30 with company president John Smith and Elizabeth Knoll, director of operations.

Mr. Schumacher told the Board that there was discussion of the two drive shaft breakages. Mr. Smith tried to get him to admit that he had caused them by failing to put the truck into "deep reduction" gear or "bull low". Mr. Schumacher testified that he told them he had indeed been in deep reduction gear when the breakages occurred.

According to Mr. Schumacher, Mr. Smith brought up the subject of the union organizing drive. He testified that the latter said he (Schumacher) had worked elsewhere and had not tried to bring in a union and why did he think they needed a union at Bruce R. Smith Limited; he claimed that Mr. Smith said he knew they had had a meeting in Hagersville and that they weren't going to succeed in unionizing the company.

Mr. Schumacher told the Board that Mr. Smith said he would let him know the next day (May 31) about his future with the company. And so, on May 31, Mr. Schumacher received from Ms. Knoll his cheque and a dismissal letter.

Another witness, driver Robert Clark, testified that he had driven the same truck on May 7, 1990. He found the brakes "poor" and the clutch "extremely bad"; with the latter, there was no "happy medium"; the clutch either fully

engaged or did not engage at all. Mr. Clark told the Board that he had reported this to Glen Simon, the company's maintenance foreman. Early in June, after Mr. Schumacher had been fired, Mr. Clark drove the truck again and there were no problems with it. He felt that repairs had been made to the clutch.

He told the Board that he had a conversation with president Smith around the time Mr. Schumacher was fired and he expressed the opinion to Mr. Smith that the problem of the drive shaft was not Mr. Schumacher's fault. It was the fault of the clutch.

Mr. Smith's rationale for firing Mr. Schumacher was that he had broken two drive shafts in a space of only nine days and was obviously incompetent. Moreover, he had previously been involved in an unreportable accident and had been warned for speeding. (Fifty or 60 other drivers also received warning letters at the same time in 1989.)

Mr. Smith conceded that other drivers had had drive shafts break on trucks in the past, but never before had the same driver had two go out on the same truck within such a short period of time. Maintenance foreman Simon testified that drive shaft breakages were common; they occurred perhaps once or twice a month.

After the May 15 incident, Mr. Smith spoke to Mr. Schumacher about it and the latter said the problem was mechanical, the fault of the equipment. Mr. Smith told the Board that at that time he "tended to believe" Mr. Schumacher's explanation of the circumstances. But he learned about the second breakage on May 24, the day it occurred. He talked to maintenance foreman Simon and they did a "mock-up" the next day - after the drive shaft had been replaced - to see what would happen with the same load

under similar conditions. Mr. Schumacher was not invited to witness the test. Both Mr. Simon and Mr. Smith drove the truck in the test and, when the truck was in deep reduction gear, there was no problem. Mr. Smith concluded that Mr. Schumacher had failed to put the vehicle in the proper gear. Moreover, the maintenance records for the vehicle showed no report of a clutch problem and indicated the clutch was in proper working order. Mr. Simon testified that Mr. Schumacher had not reported a clutch problem at any time.

Mr. Smith decided immediately, on May 25, that Mr. Schumacher should be fired. He instructed director of operations Knoll to contact Mr. Schumacher. She discovered that Mr. Schumacher's mother had just died and she arranged for Mr. Schumacher to come in for a meeting on May 30.

Both Mr. Smith and Ms. Knoll confirmed that Mr. Smith brought up the subject of the union at the meeting with Mr. Schumacher. Mr. Smith testified that he told Mr. Schumacher he was not being fired because of union activity. But both Mr. Smith and Ms. Knoll denied that Mr. Smith had said any of the other things concerning unionization reported by Mr. Schumacher (on page 5 of these reasons).

III

Former dispatcher David Cole, who was fired by president Smith on or about May 25, 1990 - obviously a busy firing day for Mr. Smith - is the nephew of operations director Knoll. He was not called to testify; hence, the picture the Board has of him tends to be rather one-sided. According to Mr. Schumacher, he got Mr. Cole to sign a union card during a break in the safety meeting in

Hagersville on May 12. Mr. Schumacher told the Board that president Smith was in the vicinity when this took place and that he believes Mr. Smith saw the two in the process of making Mr. Cole a union supporter.

In any case, Mr. Cole had worked for Bruce R. Smith Limited for almost a year when he was dismissed on May 25. According to his aunt, he simply could not handle his position in dispatch; she regaled the Board with numerous examples of his mistakes and failures, as did Mr. Smith in his testimony. Mr. Smith had talked to her several times about Mr. Cole's shortcomings and in March she had gone so far as to speak to him about his problems and to suggest he find another job. Although she had lunch with him about once a week, she did not tell him that Mr. Smith was thinking of firing him when that possibility emerged some time before the actual firing occurred. She did not feel she should mention the possible firing because she felt her business position outweighed her family relationship.

Ms. Knoll maintained that she did not know the union was attempting to organize the employees until May 29 and that she did not know Mr. Cole was involved with the union until her mother (his grandmother) told her on May 31 that he was a union supporter and was going to a union meeting that night.

Concerning Mr. Cole, president Smith testified that he decided in mid-April to get rid of him. It was not until just after the week-end of May 12, when Mr. Cole purportedly signed a union card, that a replacement was brought in to begin training. Then Mr. Cole was given the bad news on May 25.

IV

The third person alleged by the union to have been fired, contrary to the Code, is Kim Peter Butineau, a driver who was assigned mainly to the haulage of steel. According to Mr. Butineau, he took four days off at the beginning of July, 1990, to help his fiancée solve an immigration problem. When he returned to work, he was called in by Ms. Knoll and fired. He reminded her of the company policy which states that employees must be given a verbal warning and then a written warning before dismissal. Eventually she relented and he went back to work, but she sent him a letter warning him that he had been absent too much and that he would be fired if absenteeism continued.

Mr. Butineau testified that on July 20 he started work at 5:00 a.m. His truck was parked at Stelco's Hilton works in Hamilton. He took loads to and from various locations and at 11:30 a.m. was dispatched to Dofasco central shipping to pick up a load. He remained there from 11:45 until 2:00 p.m. while his truck was being loaded. At 2:00 p.m., he called the dispatcher and advised him the loading was complete. The dispatcher told him to hurry the load to a Toronto location immediately.

Mr. Butineau told the Board he replied to the dispatcher that he was going to have lunch first because he had not had a break. The dispatcher insisted he forego lunch and leave for Toronto immediately. There was argument back and forth between the two. Mr. Butineau testified that he finally told the dispatcher he was due to complete his 12-hour work day at 5:00 p.m. and there wouldn't be time to go to Toronto, unload and be back in Hamilton by 5:00 p.m., so the dispatcher had better call in the night driver and have him take the truck and load to Toronto. The

dispatcher asked him if he was refusing the load.

According to Mr. Butineau, the upshot of all this was that the dispatcher told him he was finished working there and to leave the truck. Mr. Butineau parked the loaded trailer in one place on Stelco's property (with a Dofasco load on it) and the tractor in another place. He took his belongings out of the truck and went home and called Beth Knoll.

As to the truth of the foregoing, the Board has before it no evidence directly challenging Mr. Butineau's story of what passed between him and the dispatcher. In her testimony, Ms. Knoll related what she said the dispatcher had told her about what Mr. Butineau had said, but we obviously cannot give this as much weight as the less second-hand testimony of Mr. Butineau.

Mr. Butineau told the Board that during his telephone conversation he asked Ms. Knoll if the dispatcher had the authority to fire him. (Ms. Knoll confirmed that he did ask her this question.) She replied that she would try to find out what had happened and would call him back. Mr. Butineau testified that she did call him back and she said she had talked to the dispatcher and president Smith and that the firing "stands". Mr. Butineau told the Board that he had joined the union before this incident occurred.

According to Ms. Knoll, Mr. Butineau had a high rate of absenteeism - which Mr. Butineau himself acknowledged during his cross-examination by counsel for Bruce R. Smith Limited. Ms. Knoll maintained that Mr. Butineau often did not give notice to the dispatcher that he was going to be absent. (In his testimony, Mr. Butineau denied that this was so and insisted he usually gave such notice.)

In any case, Ms. Knoll explained that after she gave Mr. Butineau a warning letter concerning absenteeism, his behaviour for the next couple of weeks was "really good". Then he called her and when she checked with the dispatcher she was told that Mr. Butineau had said he was not going to take the load to Toronto. Moreover, he told her directly that he had an appointment and that's why he wouldn't take the load. She didn't tell Mr. Butineau he was fired; she told him he had abandoned his job, that as far as she was concerned he had quit. She had no idea he was a union member.

The evidence is clear that Mr. Butineau thought he had been fired. Ms. Knoll's testimony virtually confirmed this when she admitted that he had asked her if the dispatcher could fire him. And in his testimony, Mr. Smith indicated that Mr. Butineau had behaved in such a way as to deserve termination, particularly when he parked a Dofasco load on Stelco property, contrary to company policy. The Board is of the opinion that Mr. Butineau's version of his contretemps with the dispatcher, in the absence of testimony to the contrary by the dispatcher, is to be preferred over the second-hand version related by Ms. Knoll. The latter seems to have concluded, based largely on what the dispatcher told her, that Mr. Butineau had refused a load and had abandoned his job. It appears that she was so anxious to see him no longer in the employ of Bruce R. Smith that she gave him no real opportunity to challenge her claim that he had quit. The evidence suggests strongly to the Board that the wish and the pressure for a parting of the ways belonged on Ms. Knoll's side and that what occurred was in reality a termination of Mr. Butineau by his employer.

On May 29, 1990, the union sent president Smith a telex advising that E.C.W.U. had "an organizing drive in progress" at the company and asking that he "govern himself accordingly under the Canada Labour Code". As has been indicated earlier, Ms. Knoll testified that this was the first knowledge she had of the union organizing campaign. This was also Mr. Smith's testimony. Both Mr. Smith and Ms. Knoll told the Board that, as soon as they saw that the union involved was Energy and Chemical Workers, they assumed that the lime drivers were initiating the campaign since lime is a chemical and is quarried by members of that union at Beachville and Ingersoll.

Mr. Smith testified that after receiving the telex, he said to himself, "We're at it again". His reaction was one of "disbelief" and he was "a little disappointed". This was because he felt a "third party" was not necessary and that he was a good manager. He conceded that he was familiar with union organizing campaigns, his company having been the object of two failed campaigns in the past.

Having just received the telex, Mr. Smith bumped into driver Casey Vanderbrink. He told the Board that he asked Mr. Vanderbrink if he knew anything about this. Mr. Vanderbrink said "yes" and that he was in the union and that it was going to make Bruce R. Smith Limited a better company. Mr. Vanderbrink suggested to him that unionization by the E.C.W.U. would help the company in its negotiations to renew the lime hauling contract with Stelco.

Mr. Smith interpreted Mr. Vanderbrink's expression of opinion to him - that the E.C.W.U. "would help me to

negotiate with Stelco" - as "union propaganda" that had to be contradicted. He talked on the telephone that night with his Toronto legal counsel (not the counsel who acted for him at the hearing) and apparently received legal advice that it was proper for him to speak to employees concerning this "propaganda". (The Board finds it hard to accept that Mr. Vanderbrink's expression of opinion could reasonably be characterized as "union propaganda"; one normally thinks of "union propaganda", at least in this day and age, as being an amalgam of menacing attacks on the employer and rosy promises of the dawning of a millennium for employees, much of it being highly unrealistic; on the face of it, Mr. Vanderbrink's comment sounds tame, and modest, to say the least.) However, this is said only in passing. The fact is that Mr. Smith used this as his excuse to embark on a series of largely one-on-one meetings with employees in the lime division.

Mr. Vanderbrink had a different version of the encounter with Mr. Smith. He testified that Mr. Smith called him in for a meeting. He was asked if he had anything to do with the union and he replied in the affirmative. Mr. Smith said to him that he'd seen some of them at a restaurant in Hagersville. Mr. Smith asked, "What do you want a union in for?" Mr. Vanderbrink replied, "For job security." Mr. Smith answered, "There is no such thing as job security." According to Mr. Vanderbrink, Mr. Smith said he would sooner close the place than have a union in. If the union came in, he would close the place down. Mr. Smith asked who was leading the organizing campaign: was it Fay Schumacher or Dave Stackhouse? To this, Mr. Vanderbrink replied that they were all part of it. (Mr. Smith denied saying any of the foregoing.)

Kelly Ficzero, another lime driver, testified that

Mr. Smith called him and asked him to come into the terminal to see him. He had an idea what Mr. Smith wanted to talk to him about, having heard from Casey Vanderbrink about the latter's conversation with Mr. Smith on May 29. On May 31, Mr. Ficzero had a brief talk with Mr. Smith. He testified that Mr. Smith told him it was fortunate he lived in the Brantford area because it would be easy for him to get employment. Mr. Smith told him the lime hauling contract was coming up for renewal and he did not have to bid on it. The witness told the Board that he took this to mean that he might not have a job or there might not be any lime to pull, or both, if there was a union in the company. Mr. Ficzero was laid off on the ground that there was a "shortage of work" a day or so before the United Steelworkers went on strike (at the beginning of August) and the company stopped trucking lime to Stelco's installations. (Mr. Smith denied calling Mr. Ficzero in for a meeting on May 31; he testified that he did not say any of the things attributed to him by Mr. Ficzero.)

Robert Clark testified that Mr. Smith talked to him and another driver, (whose testimony about the Schumacher truck has already been reported on page 5) who was not called as a witness, and asked why they wanted a union. Both replied that it had to do with job security. Mr. Clark told the Board that Mr. Smith said he would close the place if a union came in; he was not going to have somebody else tell him how to run his business; he didn't have to put up with that. About a week later, Mr. Smith asked him if he'd signed a union card and, when the witness said, "Yes", Mr. Smith said, "You're no better than the rest of them". (Mr. Smith, in his testimony, denied the conversation.)

(Mr. Clark was laid off on August 4. There was no dispute between the parties as to the reason. He was proceeding

as directed by the employer with a load of steel across a Steelworkers Union picket line when an incident occurred. He was subsequently charged with careless driving. He was laid off until the court case was over. No offer or assurance of legal assistance was made to him. He was simply left by the employer to twist in the wind.)

Brendan Keen met John Smith on May 30. He testified that Mr. Smith was upset because some of them had had a meeting in Hagersville with union representative Brian Little. Mr. Smith stated to him that he knew who had been at that meeting. He said he would sell the company before a union came in and he asked Mr. Keen how he (Keen) would feel if the union was responsible for people losing jobs. According to Mr. Keen, Mr. Smith said that the best thing you can do is get the union cards back and tear them up. (Mr. Smith denied having said any of the foregoing.)

Larry Reading testified that he overheard Mr. Smith tell Kelly Ficzero it was a good thing he lived in Brantford and that he (Smith) would close the lime division if there was a union.

On June 6, according to driver Norm Sabourin, John Smith asked him why he was trying to get the union in. Mr. Smith said to him: "You started here with nothing; you can leave with nothing." Mr. Sabourin told the Board that Mr. Smith seemed to know he had been involved in the signing up of a particular fellow driver and asked if that driver could get his evidence of membership back. He told him that Robert Clark would be one of the first employees to go and he (Sabourin) would be next on the list.

Mr. Smith denied saying anything like the foregoing to Mr. Sabourin, although he conceded that he did have a

discussion with him about his (Sabourin's) alleged absenteeism problem. He told the Board that he wanted to warn Sabourin that there were going to be lay-offs and that Sabourin had better "straighten up his act". He said nothing about the union.

Yet, in practically the next breath, Mr. Smith testified that he did talk to the lime drivers about the union - although he made no threats. He wanted to make sure they realized that Bruce R. Smith Limited was dealing with some powerful companies and that unionization wouldn't help him negotiate with Stelco. He told them he wanted to respond to this union propaganda. He told them his feelings - that the propaganda was untrue; that this could have an ill effect on the company; that the employees were wrong to think a union could give them job security and higher wages; that there was no room for any more money for them. He denied threatening to close the operation or saying that he'd never allow a union in the place. Director of Operations Beth Knoll, while not present at all conversations, confirmed Mr. Smith's versions of the discussions.

The evidence is clear about one thing: Mr. Smith did have discussions concerning the union with drivers in the lime division. But which description of what he said to them is closer to the truth - that outlined in the testimony of the several drivers or that of Mr. Smith and Ms. Knoll? Having seen the witnesses, having listened to what each had to say in examination-in-chief, cross-examination and re-examination, having identified minor peculiarities and inconsistencies in the Smith-Knoll stories, which have been alluded to earlier in these reasons, the Board believes that the version advanced by the drivers is more credible than that of Mr. Smith and Ms. Knoll.

The Board finds, on a balance of probabilities, that Mr. Smith, facing the third union organizing campaign in as many years, allowed himself to be carried beyond the realm of an employer's normal chagrin over the prospect of unionization into the area of very actively warning and threatening employees of dire consequences, including closure of operations and loss of jobs, if they persisted in trying to bring a union into the company. His conduct was, in this respect, in violation of both sections 94(3)(a) and 96 of the Code. He intimidated and threatened persons who proposed to become, or sought to induce other persons to become, members of the union, contrary to section 94(3)(a). He sought by intimidation or coercion to compel persons to refrain from becoming or to cease to be members of the union, contrary to section 96.

There is, however, still more to be asked and answered. Were the dismissals of Messrs. Schumacher, Cole and Butineau motivated, at least in part, because they were union members and, in Mr. Schumacher's case, had sought to induce other persons to become union members?

Both Mr. Smith and Ms. Knoll would have us believe that they knew nothing about the union organizing drive until May 29 and, since Mr. Cole was fired on May 25, "anti-union animus" could not have played a part in the decision to let him go. The fact that the union itself took the formal step of notifying the company on May 29 that an organizing campaign was under way was used by both Mr. Smith and Ms. Knoll to somehow support their claim of ignorance prior to that date. But the union's notification means only that they cannot claim ignorance of the campaign after that date. There is nothing in the evidence that prevents the Board from harbouring suspicions that they knew about the

campaign long before May 29, despite their disclaimers. For one thing, it would be incredible that in a company as large as Bruce R. Smith Limited, with a history of failed union organizing drives, there was not some employee who didn't pass word to the bosses that a new effort had been launched. It takes no vivid or fevered imagination to suspect that that happened very early in the signing-up campaign.

Secondly, there is the testimony of various drivers that Mr. Smith told them he knew there had been a meeting of lime drivers in Hagersville early in May on the subject of unionization. Admittedly, he told them this after May 29; but at the same time, we have testimony by both Mr. Smith and Ms. Knoll that they saw some lime drivers standing around outside a restaurant in Hagersville when they drove past around the time of the two meetings. It seems likely that, if what they saw impressed itself on their minds sufficiently to cause them to remember it at the hearing some months later, they had also sought, and discovered, information at the time as to what was going on.

While Mr. Cole was not brought to testify before the Board, and that must be borne in mind when the testimony of his aunt, Ms. Knoll, is weighed, the Board finds it difficult to believe that she was not aware of his union membership before his dismissal on May 25. She lunched with him at least once a week; she talked to her mother (his grandmother) every day and the latter lady apparently knew; his father also worked for Bruce R. Smith Limited.

The Board considers it probable that not only did the management of the company know before May 25 that there was a union organizing drive under way but was also aware that Mr. Cole had signed up by that time. Undoubtedly the

management was dissatisfied with Mr. Cole's performance but it is probable that the union membership was a sort of "last straw" and played a part in the decision to let him go just at that time.

In the case of Mr. Schumacher, even if, as Mr. Smith wishes us to believe, the decision to dismiss was made on May 25 but not implemented until May 31, it was still made at a time when the management, in the Board's opinion, was aware of the organizing drive. Moreover, the evidence shows that, just before it was implemented, Mr. Smith suspected Mr. Schumacher was a leading light in the union campaign, for he asked Mr. Vanderbrink if Mr. Schumacher or somebody else was the leader. The board has reported at some length on the rationale claimed by Mr. Smith for firing Mr. Schumacher. While it is not the Board's role to pass judgement on the merits of that rationale, we feel bound to say that we are not wholly impressed with it. Our unease about that, coupled with the evidence of Mr. Schumacher's leading role in the union campaign and the anti-union animus of the employer, lead us, on a balance of probabilities, to conclude that the dismissal was, in part at least, motivated by factors contrary to section 94(3)(a) of the Code.

The Board has already found that Mr. Butineau's separation from the company was a refusal to employ or a refusal to continue to employ, to paraphrase the terminology of section 94(3)(a), and not a quit. Any termination of a person during a union organizing campaign or while a certification application is pending, particularly where the Board finds that the employer has been threatening employees contrary to sections 94(3)(a) and 96 is bound to be viewed with suspicion. In this instance, the board is uneasy about the whole episode leading up to Mr. Butineau's

departure, as has been indicated earlier in these reasons, and on a balance of probabilities, finds that his departure from employment was also caused in part by reasons contrary to section 94(3)(a).

In summary, then, the Board finds:

1. The employer, Bruce R. Smith Limited, has violated sections 94(3)(a) and 96 by threatening certain employees in respect of union memberships; and
2. The employer has terminated Messrs. Cole, Schumacher and Butineau, contrary to section 94(3)(a).

VI

The union also alleged that the employer changed certain employees' hours of work and conditions of employment in violation of section 24(4). In a letter to the Board, dated October 3, 1990, the union referred to these changes in the following terms:

"... on or about July 7th, 1990 and July 8, 1990 and for a continuing period the regular drivers were sent home from their regular shift of work and the dispatchers were driving the trucks normally driven by the drivers assigned to them.

.....

It is also the Union's submission that 30 to 35 drivers of Bruce R. Smith Ltd. have been laid off because of a shortage of work as claimed by the employer ... and that ... the employer hired a similar number of replacement drivers."

At the hearing, the union presented virtually no evidence on these allegations. The employer, on the other hand, dealt with them in some detail in the testimony of both Mr. Smith and Ms. Knoll.

In the case of the first allegation, the Board is satisfied that the episode was of a minor nature, involving a mistake by a dispatcher. With respect to the second allegation, the Board understands that the company has laid off drivers as a result of the drastic reduction of its business both in the lime division and in the steel hauling division caused by the Stelco shut-down. The Board considers these lay-offs to be in the "business as before" category. The company has opened small terminals in London and Brockville and has hired locally in those centres to fill four driver positions in each. No new hires have taken place at the Walsh terminal to replace any of the laid-off persons. The Board finds no violation of the statutory freeze in section 24(4) or of any other provision of the Code in respect of these allegations.

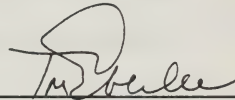
VII

Section 99 of the Code empowers the Board to order what must be done by an employer to remedy the harm caused to individuals by violations of sections 94 and 96. Under that power, the Board therefore orders Bruce R. Smith Limited to:

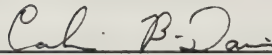
1. Comply with and cease violating sections 94(3)(a) and 96 of the Code;
2. Reinstate David Cole, Fay Schumacher and Kim Peter Butineau in the employment they held, prior to their respective terminations, within one week of the date of these reasons for decision; and
3. Compensate David Cole, Fay Schumacher and Kim Peter Butineau for wages lost during the period from their respective terminations to their reinstatement in

employment by paying to them, within one month of the date of these reasons, a sum of money equivalent to what each earned in the same period of time prior to their terminations.

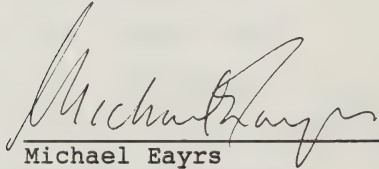
The Board appoints Peter Suchanek, Ontario Regional Director and Registrar, or a person named by him, to assist the parties to implement these orders. The Board shall remain seized of these matters so as to be able to deal with any problem that may arise in connection with the implementation of these orders and to issue a formal order should such be required.



Thomas M. Eberlee
Vice-Chairman



Calvin B. Davis
Member of the Board



Michael Eayrs
Member of the Board

ISSUED at Ottawa, this 6th day of November 1990.

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Summary

ROSEMOND LAMOUREUX,
APPLICANT, CANADIAN AIR LINES
PILOTS ASSOCIATION, RESPONDENT,
CANADIAN AIRLINES
INTERNATIONAL LTD., EMPLOYER.

Board File: 530-1852

Decision No.: 831

This is a review of a decision where the Board found that a section 37 complaint by Rosemond Lamoureux was untimely. The review application was referred back to the original panel by a summit panel of the Board. The original panel decided to hold a hearing into the timeliness issue only.

After hearing the evidence of the parties, the panel reversed its earlier decision that the complaint was untimely. It found the complaint to be timely and decided to hold a hearing into the matter.

Ce document n'est pas officiel. Les motifs de décision seulement peuvent être utilisés aux fins juridiques.

Résumé de décision

ROSEMOND LAMOUREUX,
REQUÉRANT, L'ASSOCIATION
CANADIENNE DES PILOTES DE
LIGNES AÉRIENNES, INTIMÉE, ET
LES LIGNES AÉRIENNES CANADIEN
INTERNATIONAL LTÉE,
EMPLOYEUR.

Dossier du Conseil: 530-1852

Décision n° 831

Il s'agit de la révision d'une décision dans laquelle le Conseil avait jugé qu'une plainte déposée en vertu de l'article 37 par Rosemond Lamoureux était hors délai. Un panel au sommet a renvoyé au panel original la demande de révision et celui-ci a décidé de tenir une audience sur la question de la prescription seulement.

Après avoir entendu les parties, le panel a infirmé sa décision que la plainte était hors délai. Il a jugé que la plainte avait été déposée dans les délais prescrits et a décidé de tenir une audience pour examiner la plainte au fond.



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Reasons for decision

Rosemond Lamoureux,
applicant,

Canadian Air Lines
Pilots Association,

respondent,

Canadian Airlines
International Ltd.,

employer.

Board File: 530-1852

The Board consisted of Mr. Serge Brault, Vice-Chairman,
and Messrs. Robert Cadieux and Calvin B. Davis, Members.

Appearances:

Mr. Melville W. Smith, for the applicant;

Ms. Lila Stermer and Mr. Kevin Healy, for the respondent.

These reasons for decision were written by Mr. Calvin B.
Davis, Member.

I

On May 30, 1990, the Board received an application pursuant to section 18 of the Canada Labour Code (Part I - Industrial Relations) from counsel for Mr. Rosemond Lamoureux, requesting a review of a Board decision concerning his complaint that the Canadian Air Lines Pilots Association (CALPA) had violated section 37 of the Canada Labour Code. The Board had previously informed Mr. Lamoureux by letter dated April 23, 1990 that his complaint was untimely.

Section 18 reads as follows:

"18. The Board may review, rescind, amend,
alter or vary any order or decision made by

it, and may rehear any application before making an order in respect of the application."

In accordance with the Board's usual practice, the review application was referred to a summit panel, which informed the parties of their decision on July 12, 1990:

"In accordance with its procedure in response to review applications, see United Steelworkers of America and Curragh Resources and Altus Construction Ltd. (1987), 87 CLLC 16,034 (CLRB decision no. 640), a summit panel of the Board comprised of Chairman J.F.W. Weatherill, Vice-Chairs Hugh R. Jamieson and Louise Doyon has met to consider the above-cited application for review.

After consideration of all of the submissions of the parties on file, the Board found that the application addresses an issue of fact and should be referred to the original panel comprised of Vice-Chairman Serge Brault and Members Calvin B. Davis and Robert Cadieux for consideration and disposition. Parties will be advised of that panel's decision as soon as possible."

Following the summit panel, the original panel reviewed the parties' submissions and decided to hold a hearing on the issue of timeliness on October 5, 1990. These are the panel's reasons regarding that issue.

II

In the original panel's letter regarding the section 37 complaint, the panel described the timeliness issue in the following manner:

"April 23, 1990

Mr. Lamoureux's complaint was filed with the Board on December 16, 1988. He claims he had knowledge of CALPA's position on or after September 19, 1988. He, in fact, filed an affidavit which contradicts his Exhibit 17 as to when he had knowledge the union was going to no longer pursue his complaint.

However, after perusing Exhibit 17, the

Board cannot agree with Mr. Lamoureux. This letter was dated September 17, 1988. The pertinent part of the letter to Mr. Gyarmathy, the Association's Grievance Committee Chairman, from Mr. Lamoureux, is as follows:

'Documentation of the recent grievance hearings in Vancouver indicate that my complete file would not be difficult to secure. This obligation assumed by the Company was never fulfilled. On September 8, 1988, you informed my wife and I, by telephone, of a recent letter you received from Captain Gilliland in which he refuses release to me - copy or copies of my complete file.

You were informed at that time that I wished to grieve the issue of my record and the state of the portions already in my possession. Due to your schedule, we agreed to file this grievance on Friday, Sept. 16, 1988, at CALPA headquarters in Montréal.

We have been informed by you yesterday morning, and again by MEC chairman Kevin Healy last evening that he disallows my right to grieve this action by the Company. I believe this to be denial of due process to which I have access under the terms and conditions of a collective agreement. (i.e. Section 17.08 of the grievance procedure)

It is my strong position that in no way has my grievance been either exhausted nor settled, and that CALPA is waiving the general provisions and policies of the Association to which I have fulfilled my obligations for the past eighteen years.'

It is therefore quite clear to the Board that the complainant knew on at least September 16, that the union was not pursuing his grievance.

The Board in dismissing this complaint is, of course, well aware that Mr. Lamoureux has just barely gone over the ninety-day time limit as contemplated by the Code. However, the Board does not have the power to make an exception even if the time limit is missed by a day or two."

Mr. Lamoureux, a pilot since 1971, was dismissed by Canadian Airlines International Ltd. on April 8, 1988. He filed a grievance with CALPA. In a letter dated September 19, 1988, the union advised him it was not referring his dismissal grievance to arbitration. That action gave rise to Mr. Lamoureux filing a complaint with the Board on December 16, 1988.

When the union decided not to proceed to arbitration, Mr. Lamoureux was in poor health. He was taking anti-depressant medication. He had been admitted to hospital on September 13 to undergo a minor operation, and then released on the morning of September 15. Mr. Lamoureux's psychiatrist, also a consultant to CALPA, testified about the cumulative effects of the drugs Mr. Lamoureux was given for his operation and those he prescribed him for a depression.

Mrs. Lamoureux, a teacher of nursing and a registered nurse, assisted her husband with his grievance, and had been present at some of the grievance proceedings. She explained to the Board that when her husband returned from the hospital, he was sedated and spent a great deal of time in bed.

On the morning of Friday, September 16, Mrs. Lamoureux phoned Captain Louis Gyarmathy, a grievance representative of the union, to confirm the meeting scheduled with him later that day. Mr. Gyarmathy cancelled the meeting and told her the Master Executive Council (MEC) had met the day before to discuss whether the dismissal grievance should be sent to arbitration. However, according to Mrs. Lamoureux, he could give her no other detail, for he had not been present. Mrs. Lamoureux testified that he did not speak to her husband at any time on September 16 while Mr. Gyarmathy says that he realized during the conversation that Mr. Lamoureux was on the line.

According to her testimony, later that evening, Mrs. Lamoureux took a call from MEC Chairman, Kevin Healy. She explained her husband's health situation and Mr.

Healy informed her that the MEC had decided not to refer her husband's grievance to arbitration as it had very little chance of succeeding. She was shocked when she heard this and contemplated how to break the bad news to her husband.

In his testimony, Captain Healy says that he called the Lamoureux residence around 4:30 p.m. on September 16. Mrs. Lamoureux answered the telephone. He asked to speak to Mr. Lamoureux, but she said he was not feeling well. When he informed her of the MEC's decision, she asked him who was present at the meeting, was Mr. Gyarmathy there, was the decision voted on, and so on. Captain Healy tried to answer her questions to the best of his ability. She told him that she would pass the message on to her husband. He says she never mentioned the conversation she had had with Mr. Gyarmathy earlier that day.

A friend of Mrs. Lamoureux's, Louise Lavallée, a nurse, came to spend the weekend with the Lamoureux household. She arrived while Mrs. Lamoureux was on the phone with Captain Healy. When Mrs. Lamoureux got off the phone, the two of them discussed at great length when and how they would break the bad news to Mr. Lamoureux. They decided to inform him of the situation on the next Monday evening, and Ms. Lavallée agreed to be present. Mrs. Lamoureux then proceeded to draft a letter to the union. She typed the letter on September 17 and presented it to her husband for signature. Her husband, quite sedated at the time, was prepared to sign the letter without reading it. She read the letter to him, and in the presence of Ms. Lavallée he signed it. This letter (exhibit 17) is reproduced at length in the letter decision appearing on pages 2 and 3 of this decision.

Finally, on Monday night, September 19, 1988, with Ms. Lavallée present, Mrs. Lamoureux informed her husband that the union was not referring his grievance to arbitration. Mr. Lamoureux was quite upset at hearing this news.

III

When dealing with duty of fair representation complaints (section 37), the Board must determine whether or not the complaint is timely.

Section 97(2) of the Code provides as follows:

"97.(2) Subject to subsections (3) to (5), a complaint pursuant to subsection (1) shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint."

In Rosario Coulombe (1989), as yet unreported CLRB decision no. 747, the Board reviewed the Supreme Court's ruling regarding the 90-day time limit and stated the following:

"However, in the case of complaints of unfair labour practice, the Board has repeatedly dealt with the question of the 90-day time limit that any person has in which to file a complaint under section 97(2) of Part I of the Code. In 1979, the Supreme Court of Canada rendered a judgment in which it established for the first time the guidelines that apply to this question."

While the Board had long believed that section 16(m) empowered it to change a time limit prescribed by the Code, the Supreme Court rejected this interpretation and held that the section in question did not give the Board the power to alter the time limit for filing a complaint (see Upper Lakes Shipping Ltd. v. Mike Sheehan et al., [1979] 1 S.C.R. 902).

Section 16(m) reads as follows:

'16. The Board has, in relation to any proceeding before it, power

...

(m) to abridge or enlarge the time for instituting the proceeding or for doing any act, filing any document or presenting any evidence in connection with the proceeding; ...'

The late Chief Justice Laskin explained his reasoning as follows:

'I read this provision as empowering the Board to abridge or enlarge the time for taking steps in a proceeding which is properly before it, as, for example, a certification proceeding. If, however, the issue is whether a proceeding is timely under the Board's governing statute, that is, whether the Board can lawfully entertain it at all in the light of s. 187(2)[now 97(2)], I do not regard its powers under s. 118(m) [now 16(m)] as entitling it to give latitude to a complainant who is out of time under the statute. The correlative would be that if it can enlarge it can abridge, and that would be absurd. A complainant is entitled to the advantage and is subject to the limitation of the ninety day period under s. 187(2). It can neither be restricted to a lesser period by any direction of the Board nor be allowed a greater period.'

(page 915)

In the light of this interpretation of the scope of sections 16(m) and 97(2) of the Code, one must conclude that the 90-day time limit prescribed is strict and that failure to observe it results in a loss of the right.

In this regard, see John P. Grogan (1986), 67 di 183 (CLRB no. 594), and M.G. Lévesque (1985), 62 di 62 (CLRB no. 523), in which the Board cited with approval the following excerpt from Donald J. Jollimore (1982), 48 di 63 (CLRB no. 368):

'... The Board does not deprive any person of their rights under the Code lightly and certainly never when matters of a technical or procedural nature are correctable under section 203 of the Code. Since the Supreme Court handed down its decision in Upper Lakes Shipping Ltd. v. Mike Sheehan, [1979] 1 S.C.R. 902, the time for filing or instituting a matter before the Board is not a discretionary matter. Prior to that decision the Board relied on its apparent discretion under section 118(m),

...

to vary time limits in the circumstances of any given case. The Supreme Court said however that the Board has no such authority

and the Board's hands have been tied.'
(page 67)"(pages 8-9; emphasis added)

The Board must ask itself when did the complainant know or ought to have known of the action or circumstances giving rise to the complaint. With the conflicting evidence the panel has before it, credibility is an issue.

Of great interest to the Board is Mr. Gyarmathy's evidence. Did he in fact inform Mr. Lamoureux on the morning of September 16 that the union would not refer the grievance to arbitration or, if he did, was he explicit enough as to leave no doubt in Mr. Lamoureux's mind?

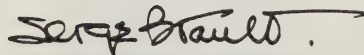
Given the uncontradicted evidence about Mr. Lamoureux's health condition on the morning of September 16, the Board concludes that Mr. Lamoureux was not informed of the fate of his grievance on the morning of September 16. Captain Healy who did speak to Mrs. Lamoureux later that day received no indication from her that she and her husband already knew of the MEC's decision not to refer the grievance to arbitration. He testified she said she would pass his message on to Mr. Lamoureux. This in our view confirms she did not know before then, nor her husband, about the MEC decision. The panel feels that it is inconceivable that during the conversation with Captain Healy, Mrs. Lamoureux would not have mentioned her earlier conversation with Mr. Gyarmathy.

This is also confirmed by the evidence of Ms. Lavallée who on purpose agreed to be present the next Monday when Mrs. Lamoureux was to break the news to her husband. We

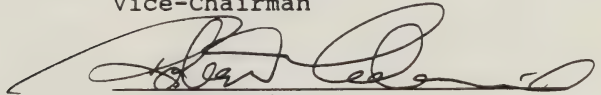
prefer Mrs. Lamoureux's evidence, and that of Ms. Lavallée, to the effect that Mr. Lamoureux only found out on Monday evening, September the 19th, that his grievance would not proceed to arbitration.

As to the letter Mr. Lamoureux signed on September 17 (exhibit 17), we have direct evidence that he signed it, under sedation, without really understanding its contents.

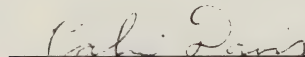
Upon review and given the provision of section 97(2) of the Code and in view of our finding that Mr. Lamoureux's complaint was filed within 90 days of his knowledge of CALPA's decision, the Board reverses its decision of April 23, 1990 that the complaint was untimely. It finds that the complaint of Rosemond Lamoureux (file no. 745-3097) is timely and that it should proceed to a hearing on its merits. The parties shall be notified shortly of the hearing dates.



M^e Serge Brault
Vice-Chairman



Robert Cadieux
Member



Calvin Davis
Member

ISSUED AT Ottawa this 9th day of November 1990.

information

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Summary

Garry L. Ager, complainant, and Canadian National Railway Company, respondent.

Board File: 745-3728

Decision no. 832

RÉSUMÉ

Garry L. Ager, plaignant, et la Compagnie des chemins de fer nationaux du Canada, intimée.

Dossier du Conseil: 745-3728

Décision n° 832

This case deals with a complaint in which it is alleged that CNR, the employer, breached section 94(1) of the Canada Labour Code (Part I - Industrial Relations), by filing with the Board an application pursuant to section 18 of the Code. In that review application, CNR had requested that its running trades employees be amalgamated into a single bargaining unit. In the complainant's view, that is tantamount to interference with the administration of a trade union and constitutes an unfair labour practice.

The complainant submits that as the allegation raises is a question of law, the matter should be referred to the Federal Court of Appeal pursuant to section 28(4) of the Federal Court Act.

The complainant further submits that he should be free to join the trade union of his choice.

With respect to the employer's application, the Board reviewed the rules set out in previous decisions concerning the nature of applications: it does not matter what party initiates a review to be undertaken by the Board, the purpose of a review being to rationalize bargaining unit structures. And the Code confers on the Board the responsibility to determine bargaining units. To determine whether the employer's application constitutes interference with the administration of a trade union, the Board must consider the circumstances of each case and find a pattern of interference. The Board concluded that there was no evidence of interference.

In the Board's opinion, the matter need not be referred to the Federal Court since the issue raised is a labour relations matter that falls within its jurisdiction.

Concerning the complainant's submission on freedom of choice, the individual employees' freedom of choice is given expression only

La présente affaire porte sur une plainte dans laquelle il est allégué que CNR, l'employeur, a enfreint le paragraphe 94(1) du Code canadien du travail (Partie I - Relations du travail), lorsqu'il a présenté au Conseil une demande en vertu de l'article 18 du Code. Dans cette demande de révision, CNR demandait que ses employés itinérants soient réunis dans une seule unité de négociation. De l'avis du plaignant, ce geste correspondait à de l'ingérence dans l'administration d'un syndicat et constituait une pratique déloyale de travail.

Le plaignant prétend que, puisque l'allégation qu'il formule est une question de droit, l'affaire devrait être renvoyée à la Cour d'appel fédérale aux termes du paragraphe 28(4) de la Loi sur la Cour fédérale.

En outre, le plaignant affirme qu'il devrait être libre de devenir membre du syndicat de son choix.

En ce qui a trait à la demande de l'employeur, le Conseil a passé en revue les règles énoncées dans des décisions antérieures concernant la nature des demandes: il importe peu quelle partie demande au Conseil d'entamer le processus de révision, puisque la révision a pour but de rationaliser la structure de négociation. De plus, le Code confère au Conseil la responsabilité de déterminer les unités de négociation. Pour décider si la demande de l'employeur constitue de l'ingérence dans l'administration d'un syndicat, le Conseil doit tenir compte des circonstances de chaque affaire et conclure à l'existence d'autres exemples d'ingérence. Le Conseil a conclu qu'aucune preuve d'ingérence n'avait été produite.

De l'avis du Conseil, il n'est pas nécessaire de renvoyer l'affaire à la Cour fédérale puisqu'il s'agit d'une question liée aux relations de travail, et donc de son ressort.

En ce qui trait à la prétention du plaignant concernant la liberté de choix, soulignons que les employés ne manifestent leur liberté

through their vote either for or against a trade union and therefore becomes subordinated to the wishes of the majority of the employees in the bargaining unit.

In conclusion, the Board found that the material before it did not establish a violation of the Code and accordingly dismissed the complaint.

de choix qu'au moment où ils votent pour ou contre un syndicat; cette liberté devient donc subordonnée aux désirs de la majorité des employés membres de l'unité de négociation.

En conclusion, le Conseil a jugé que les pièces devant lui ne lui permettaient pas de conclure à une violation du Code et a donc rejeté la plainte.

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Reasons for decision

Garry L. Ager,
applicant,

and

Canadian National
Railway Company,

respondent.

Board File: 745-3728

The Board was composed of Mr. J.F.W. Weatherill, Chairman,
Ms. Ginette Gosselin and Ms. Mary Rozenberg, Members.

Counsel of Record

Mr. John A. Coleman, Counsel for the respondent;
Mr. Michael A. Church, Counsel for the United
Transportation Union; and
Mr. James L. Shields, Counsel for the Brotherhood of
Locomotive Engineers.

These reasons for decision were written by Ms. Mary
Rozenberg, Member.

The complainant, Garry L. Ager, did not request a hearing
into this complaint and stated that he is prepared to let
the Board adjudicate this matter on the basis of the
parties' written submissions. The respondent, Canadian
National Railway (CNR), advised the Board that it agrees
with the complainant that a hearing is not warranted in
this matter.

As a preliminary matter, the complainant states that the
allegation raised by this complaint is a question of law
and requests that the Board refer the matter to the

Federal Court of Appeal of Canada for a ruling pursuant to the provisions of section 28(4) of the Federal Court Act.

Section 28(4) of the Federal Court Act reads as follows:

"28.(4) A federal board, commission or other tribunal to which subsection (1) applies may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Court of Appeal for hearing and determination."

The respondent takes the position that there is no question of law to be referred to the Federal Court of Appeal under section 28(4) of the Federal Court Act.

The use of the word "may" in section 28(4) gives the Board discretion to refer matters of law, of jurisdiction or of practice and procedure to the Court of Appeal. The subject matter of the complaint submitted to the Board for due consideration is "does the employer's application under section 18 constitute an interference in the formation and administration of a trade union thereby resulting in an unfair labour practice." The issue in this case is a labour relations matter which typically falls within the Board's jurisdiction and expertise. Therefore, the complaint will be dealt with by this panel of the Board.

Mr. Ager alleges that CNR breached the provisions of section 94(1) of the Canada Labour Code (Part I - Industrial Relations) by filing an application pursuant to section 18 of the Code with the Board. CNR has requested (file no. 530-1851) that the Board undertake a review of the appropriateness of the current bargaining units covering the running trades employees represented by the Brotherhood of Locomotive Engineers and the United

Transportation Union with a view to their consolidation into a single bargaining unit. The complainant alleges that the application constitutes an unfair labour practice in that it interferes with the formation and administration of a trade union. He submits that he should be free to join the union of his choice and not of the company's choice. Additionally, the complainant submits that the alleged interference could lead to infighting between the bargaining units for control, which could be costly to the members affected.

According to the complainant, no provision in the Code allows an employer to make an application for the determination of a unit appropriate for collective bargaining and, therefore, CNR's application conflicts with section 94(1)(a) and constitutes an unfair labour practice within the meaning of the Code.

The respondent asks the Board to dismiss the complaint and says that it is absurd to suggest that an application filed by an employer pursuant to section 18 of the Code might constitute an unfair labour practice of any kind.

The relevant provisions of the Code are as follows:

"8.(1) Every employee is free to join the trade union of his choice and to participate in its lawful activities."

"18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application."

"94.(1) No employer or person acting on behalf of an employer shall

(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union."

Mr. Ager questions the validity of the employer's application, raising the issue whether or not it is entitled to make an application for a review of bargaining units. Section 18 provides no limitations or restrictions as to what party can or cannot request a review. Nor are there any limitations or restrictions elsewhere in Part I of the Code or in the Board's Regulations.

The necessity of evolving structures to facilitate collective bargaining was foreseen in the Woods Report (Canadian Industrial Relations: The Report of Task Force on Labour Relations (Ottawa: Privy Council Office, December 1968) (Chair: H.D. Woods)). That report contemplated the possibility of redetermining bargaining units. The Task Force indicated that "where sound industrial relations call for a narrowing of units, the procedure for determining and redetermining bargaining units should be such as to facilitate that evolution." (paragraph 451, page 142).

The Woods Task Force is of the view that

"452. ... the parties of interest also should have the right to petition the Board to reconsider an existing unit in the interests of better industrial relations. Where the Board acts on its own motion, or accedes to a petition, it should examine the problems of the industry, either on its own or by commissioned research, and should hold public hearings on the basis of that research and on related material presented by the parties. The exercise of this power could well be related to mergers and successions of corporations and trade unions."

(page 142; emphasis added)

The Task Force continues:

"549. Reference is made elsewhere in this Part to the desirability of facilitating the structuring of bargaining units to allow industrial relationships to seek their own level. Also referred to is the role of the Canada Labour Relations Board in the exercise of its power to review its decisions to act as the main agent of facilitation, either on its own motion or on the initiative of a party of interest, after public hearings based on an examination of the industry.
...

551. In restructuring bargaining units we recommend that the Canada Labour Relations Board have power to join existing units in one certificate, to order joint bargaining where more than two unions or two employers are involved, and to take other steps it considers appropriate to bring the legal determination of units into line with a natural determination of the bargaining structure.

552. As noted above, the choices of form which the unit may take are numerous. We record them not to indicate favourites but to suggest the scope for this discretion in seeking the policy of 'freeing' unit determinations both before and after original certifications. ..."

(page 164; emphasis added)

The bargaining units at issue (those represented by the Brotherhood of Locomotive Engineers and the United Transportation Union) have over the years been the subject of certificates issued by the Board as being appropriate for collective bargaining. The Board certification orders continue to exercise a continuing control (see Telegraph Canada (1979), 32 di 270; [1979] 3 Can LRBR 86; and 80 CLLC 16,025 (partial report) (CLRB no. 198), over bargaining unit definition for collective bargaining purposes, thereby falling within the realm of section 18 and the Board's jurisdiction to review.

The Board commented in Canadian National Railways (1975), 9 di 20; [1975] 1 Can LRBR 327; and 75 CLLC 16,158 (CLRB no. 41):

"Whenever an order or decision of the Board has a continuing effect, and this is

typically the case where a Certification Order has been issued, various circumstances may change which may require corresponding amendments or clarifications of the Board's original decision. ..."

(pages 25; 335; and 1184)

CNR is a legitimate and interested party to the collective bargaining process at issue. In its application, the employer requests that the Board undertake a bargaining unit review. The issue raised in the employer's application is what in the Board's determination is a unit appropriate for collective bargaining. The question is not what unit(s) would the employer want to bargain with, or what unit(s) do the employees or some of the employees want, or what does the trade union want its unit(s) to be.

Tele globe Canada, supra, is the leading decision with respect to review of bargaining units where unions make application to the Board to review their certifications as they pertain to bargaining unit size or jurisdiction. In Canada Transport Limited (1989), 5 CLRBR (2d) 119; and 89 CLLC 16,044 (CLRBR no. 759), the Board stated that they failed to see why the rules set out in Tele globe Canada, supra, for the review of a certification requested by a union should not apply when an employer makes that request or when the Board initiates the proceedings.

The Board views its role vis-à-vis bargaining unit determination as ongoing and encourages parties to certification orders to come to the Board when circumstances warrant variances to bargaining unit descriptions. In Cape Breton Development Corporation (1987), 72 di 73; 19 CLRBR (NS) 212; and 88 CLLC 16,005 (CLRB no. 661), the Board examines its powers to review

and reshape bargaining units in industrial settings and to eliminate existing bargaining rights against the wishes of the employees where the unit is no longer appropriate for collective bargaining. If circumstances change, bargaining unit structures are not immune. The Board stated in Cape Breton Development Corporation, supra:

"Furthermore, it has been clearly established by this Board that trade unions which hold bargaining rights for any particular group of employees are not vested with proprietary rights in the continued existence of the bargaining rights. ..."

(pages 96; 235; and 14,032)

The purpose of a review exercise is to rationalize bargaining unit structures.

Under section 27 of the Code, the Board is responsible for the determination of appropriate bargaining units. Section 28 of the Code confers on the Board the discretion, the responsibility, and the obligation to determine the unit that is appropriate for collective bargaining. We have said in National Bank of Canada, Senneterre, Quebec branch (1987), 68 di 140; and 87 CLLC 16,041 (CLRB no. 609), that the discretion is "never absolute and must be exercised in a manner that is consistent with the purpose of the statute that conferred it" (pages 157; and 14,322). . . Even upon undertaking a bargaining unit review, the Board continues to retain and exercise continuing control over bargaining unit determination no matter which of the interested parties initiates the review process.

Does the employer's application constitute interference with the formation or administration of a trade union and

hence an unfair labour practice? This panel is of the opinion that such a question is one of fact, to be determined in the light of the circumstances of each case. If the evidence submitted establishes a pattern of interference by the employer, then perhaps it might be said that an application is part of such a pattern. However, if the evidence fails to establish a pattern of interference, then it is unlikely that an application in itself would or could constitute employer interference.

The complainant submitted that he should be free to join the union of his choice. The choice of bargaining agent is however a matter for the majority of the employees within a bargaining unit to decide. The Board has stated in British Columbia Telephone Company (1977), 22 di 507; [1977] 2 Can LRBR 404; and 77 CLLC 16,108 (CLRB no. 99):

"...for the purpose of making that determination, it should matter little whether the person or persons whose status is raised in the application wish the trade union to represent them as their bargaining agent. Obviously, in order to be certified as bargaining agent for a bargaining unit, a trade union must enjoy the support of a majority of the employees in the unit found to be appropriate by the Board. However, in order to make the determination required by section 126(c) [now 28(c)] of the Code, the Board does not and must not consider the wishes of individual employees or of employees in given positions or classifications but the overall wishes of all the employees included in the unit which it has found appropriate. It is a basic principle of our labour relations legislation that the wishes of the majority of the employees in an appropriate bargaining unit must prevail with regard to the question of whether a trade union will be certified as bargaining agent for the whole unit, and which trade union must be so certified. In such a context it is unavoidable that some employees or groups of employees may disagree with the majority and that their wishes may have to be subjected to those of the majority. There appears to be no valid justification to depart from this principle in the context of an application for review made pursuant to section 119 [now 18] of the Code ..."

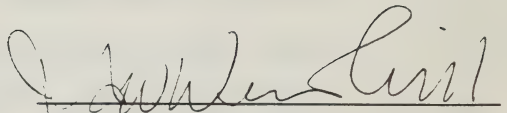
(pages 526; 420; and 668)

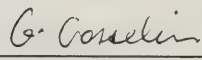
Bargaining agents or representatives are selected by the majority of the members of an appropriate bargaining unit. All employees within a bargaining unit have the right to participate in the selection of the bargaining agent, the trade union that will represent the bargaining unit. The individual employee's freedom of choice is given expression only through their vote either for or against a trade union. Once that vote and those of the other voting individuals of the bargaining unit have been ascertained, the individual's freedom of choice is subordinated to the wishes of the majority of employees.

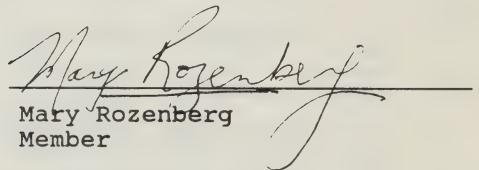
Nothing prevents employees from belonging to the trade union of their choice. What is in issue here however is not the union membership of an individual, but rather the appropriateness of a bargaining unit.

Employers, employees and trade unions have an interest in the determination of a unit appropriate for collective bargaining, which is not to say that the Board would necessarily proceed with any request for bargaining unit review which any of the above might initiate. When such a determination is made and a particular bargaining agent is chosen as the exclusive representative of a bargaining unit, that determination may indeed have repercussions on the bargaining agent or on other would-be bargaining agents. This fact however does not require the conclusion that to raise the question of the appropriateness of bargaining units necessarily constitutes interference with the formation and administration of a trade union.

For all of the foregoing reasons, we conclude that the material before us does not establish a violation of the Code. Accordingly, the complaint is dismissed.


Mr. J.F.W. Weatherill
Chairman


Ginette Gosselin
Member


Mary Rozenberg
Member

ISSUED at Ottawa, this 23rd day of November 1990.

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Summary

National Association of Broadcast Employees and Technicians (NABET-CLC), complainant, and Réseau de Télévision Quatre Saisons Inc., respondent.

Board File: 745-3718

Decision no. 833

The complainant alleges that the employer had abolished a position of accounting secretary following the filing of an application for certification, in violation of section 24(4) of the Canada Labour Code (Part I - Industrial Relations). According to the complainant this action does not comply with the "business as before" principle established by the Board.

After reviewing the case law as well as the sequence and context in which the change occurred, the Board concluded that the employer had not violated section 24(4) of the Code.

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RÉSUMÉ

Association nationale des employés et techniciens en radiodiffusion (NABET-CTC), plaignante, et Réseau de Télévision Quatre Saisons Inc., intimée.

Dossier du Conseil: 745-3718

N° de décision: 833

La plaignante allègue que l'employeur a aboli un poste de secrétaire à la comptabilité après le dépôt d'une demande d'accréditation en violation du paragraphe 24(4) du Code canadien du travail (Partie I - Relations du travail), ce qui selon la plaignante ne cadre pas avec le principe de «gestion courante» établi par le Conseil.

Après examen de la jurisprudence ainsi que de la séquence et du contexte dans lequel le changement s'est fait, le Conseil a conclu que l'employeur n'avait pas violé le paragraphe 24(4) du Code.



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Reasons for decision

National Association of
Broadcast Employees and
Technicians (NABET-CLC),

complainant,

and

Réseau de Télévision Quatre
Saisons Inc.,

respondent.

Board File: 745-3718

The Board was composed of Ms. Louise Doyon, Vice-Chair, as well as Messrs. Robert Cadieux and J. Jacques Alary, Members.

Appearances:

Ms. Sylvie Graton, for the employer; and

Mr. Luc Quesnel, for the complainant.

These reasons for decision were written by Mr. J. Jacques Alary, Member.

I

The complainant, the National Association of Broadcast Employees and Technicians (NABET-CLC), filed a complaint with the Board on August 7, 1990, alleging that Réseau de Télévision Quatre Saisons Inc. contravened section 24(4) of the Canada Labour Code by abolishing, on June 15, 1990, the position of secretary to accounting. According to the complainant, this position was abolished subsequent to the filing, on December 19, 1989, of an application for certification (file 555-3052) and resulted in the altering of terms and conditions of employment.

The Board heard the complaint on October 26, 1990.

The facts

In November 1989, Réseau de Télévision Quatre Saisons Inc. (Quatre Saisons) conducted interviews in order to hire an incumbent for the new position of director of Administrative Services.

During these interviews, Quatre Saisons explained that the incumbent of this position would be responsible, among other things, for reorganizing the Administrative Services.

The interviews resulted in the hiring of Francine Côté, a chartered accountant, who took up her duties on December 4, 1989, as director of Administrative Services, reporting to the vice-president of Administrative Services, François Laurin.

As soon as Ms. Côté took up her duties, Quatre Saisons introduced the new organization chart prepared on October 30, 1989, which amended that of October 13, 1989. This change altered the responsibilities of certain employees. For example, Gilles Poulin, comptroller in Administrative Services, gave up certain responsibilities such as credit and purchasing.

Upon her arrival, Ms. Côté began making changes to the Administrative Services department. She set her objectives and her priorities: establishing more effective accounting and control systems; reassessing the purchasing and financial services; and developing a central computer system.

Martine Grimard, the incumbent of the position that was abolished, had at the time been occupying the position of secretary since November 27, 1989. Her duties were not altered and she continued to report to Mr. Poulin.

On December 19, 1989, the National Association of Broadcast Employees and Technicians applied for certification (file 555-3052) to represent the employees in Administrative Services.

When the application for certification was filed, Quatre Saisons had made further changes to the structure of the department by adding a temporary accounting clerk position to replace an employee who was on sick leave. This accounting clerk's duties consisted in entering data and helping one of the accountants in pay. Ms. Côté had also begun redefining the responsibilities of certain positions within her department.

The Board notes that in January 1990, as the result of changes in responsibilities in her department, Ms. Côté exercised more direct control over certain aspects of the work performed by Ms. Grimard.

From December 1989 to March 1990, following the return of the employee who had been on sick leave, the temporary accounting clerk was assigned to help another accountant. In March 1990, this position became permanent and remained under the authority of the comptroller.

Moreover, the educational requirements of the position were defined: the incumbent had to have a DEC (Diploma of Collegial Studies) in administration or have completed one year of university studies in accounting.

Ms. Côté continued her reorganization, discussing its form with the vice-president Laurin. She did not, however, give the employees any indication that the changes planned would

go so far as to eliminate certain positions. In May, Mr. Poulin, the comptroller, left Quatre Saisons.

At the same time, Ms. Grimard, who wanted to take holidays in June, took steps to obtain the required authorization and pay for this period.

She made a number of inquiries to the pay service and was told that it had yet to receive the authorizations necessary to process her request.

On June 15, 1990, around 5:00 p.m., Ms. Côté called Ms. Grimard into her office to tell her, without any advance warning, that her employment was being terminated. Ms. Côté explained that the secretary position had been abolished and replaced by an accounting clerk position. There were discussions as to whether Ms. Grimard could fill that position since she had taken a number of accounting courses.

Ms. Côté concluded that Ms. Grimard's education did not meet Quatre Saisons' requirements for filling the accounting clerk position. The incumbent had to have a DEC in administration or have completed one year of university studies in accounting.

Quatre Saisons subsequently made further changes to the Administrative Services department, replacing the position of comptroller with that of assistant director, accounting and systems. It created an accounting clerk position whose incumbent reported to the assistant director. The human resources liaison officer no longer reported to Ms. Côté, and the secretary position, occupied by Ms. Grimard, was abolished.

Ms. Côté explained to the Board that these changes were necessary because of the new role entrusted to this department (tighter control) and the administration of three new collective agreements.

These changes meant increased responsibilities for certain positions, which explained why the position of accounting clerk was created. Following these changes, there was no longer any need to maintain the position of secretary.

After Ms. Grimard's departure and the abolition of her position, Quatre Saisons reassigned the duties she performed. These duties were divided between the accounting clerks and the other employees of Administrative Services. Secretarial work was performed by the secretary to the vice-president of Administrative Services.

In the wake of these changes, the National Association of Broadcast Employees and Technicians filed this complaint on August 7, 1990.

Arguments

The union argued that in abolishing the secretary position on June 15, 1990 and creating the accounting clerk position after the application for certification was filed, the employer altered the terms and conditions of employment, thereby contravening section 24(4) of the Code.

According to the union, the "business as before" principle did not apply here because the decision to make these changes was made after the application for certification was filed and because these changes were not announced until June 15.

The union further argued that Ms. Grimard's duties were divided only among the other employees of the department, thereby enabling the employer to eliminate a salary and a position.

Counsel for the complainant also maintained that nothing in the evidence showed continuity between the period that preceded the application and the action taken on June 15, 1990. Ms. Côté's decision to carry out a reorganization without any prior notice was a departure from the "business as before" principle.

Finally, counsel for the complainant stated that Ms. Grimard was qualified for the accounting clerk position.

Quatre Saisons, for its part, alleged that the secretary position was abolished as part of the reorganization begun in the fall of 1989, before the application was filed.

In September 1989, two positions were created: purchasing agent and pay supervisor.

In November, during the interviews to fill the position of director of Administrative Services, vice-president Laurin had told the eventual incumbent of the position what the mandate would be. In December 1990, upon Ms. Côté's arrival, the reorganization began with a number of changes.

- new reporting relationships
- reassessment of various services
- the creation, in March 1989, of an accounting clerk position
- the departure of the comptroller
- changes to the accounting and audit systems
- changes to shifts
- abolition of the secretary position

- creation of another accounting clerk position
- creation of the position of assistant director, accounting and systems, to replace the position of comptroller

It is clear that when the application was filed, the reorganization was already under way. The abolition, on the one hand, of a secretary position covered by the certification was offset, on the other hand, by the creation of other positions that were also covered by the application.

It is also clear that Ms. Grimard did not meet the educational requirements to fill the accounting clerk position.

Decision

The "business as before" principle has been repeatedly explained by the Board.

In Québec Aviation Limitée (1985), 62 di 41 (CLRB no. 522), the Board said:

"The primary focus of the Board when looking at a complaint filed pursuant to section 124(4) [24(4)] is an objective one. The Board will look at the employer's normal business practices and will attempt to determine, through the evidence, whether the changes made are part of the employer's normal practices or whether the alterations effected by the employer do not conform to the same business practices that were practised previously."

(page 55)

See also Canadian Imperial Bank of Commerce (Creston and St. Catharines) (1979), 35 di 105; [1980] 1 Can LRBR 307; and 80 CLLC 16,002 (CLRB no. 202); Royal Bank of Canada (Kamloops and Gibsons) (1978), 27 di 701; [1978] 2 Can LRBR 159; and 78 CLLC 16,132 (CLRB no. 125); Bessette Transport Inc. (1981), 43 di 64 (CLRB no. 299). See also MacLean Hunter Cable TV Limited (1979), 34 di 752; and [1979] 2 Can

LRBR 1 (CLRB no. 179); Radio LaTuque Ltée (CFILM) (1980), 42 di 108 (CLRB no. 276); Oshawa Flying Club (1981), 42 di 306; and [1981] 2 Can LRBR 95 (CLRB no. 293); Cabano Transport Ltd. (1981), 42 di 318 (CLRB no. 294); Crosbie Offshore Services Limited (1982), 51 di 120 (CLRB no. 399); Ottawa-Carleton Regional Transit Commission (1983), 51 di 173; and 83 CLLC 16,016 (CLRB no. 406); Québecair (1985), 60 di 119; and 86 CLLC 16,001 (CLRB no. 505); Mid-Continental Tank Lines Inc. (1986), 64 di 97; and 12 CLRBR (NS) 138 (CLRB no. 558); Voyageur Colonial Limited (1986), 64 di 167 (CLRB no. 563); Maritime Employers' Association (1986), 68 di 40; and 87 CLLC 16,024 (CLRB no. 601); Overland Express, division of TNT Canada Inc. (1987), 70 di 79 (CLRB no. 631); Bruce R. Smith Limited (1990), 91 CLLC 16,002 (CLRB no. 830).

These past Board decisions can be summarized in the following question: did the changes made by the employer begin before the application for certification was filed or did they occur in the normal course of the operation of the business?

To properly answer this question, we must examine the sequence and context of the changes.

In this case, an examination of the evidence reveals the following facts.

- October 1989 - reorganization of Administrative Services by adding a position, that of director of Administrative Services
- interviewing of prospective candidates for the position of director of Administrative Services
- explanation to the applicant of the reorganization mandate
- hiring of the director of Administrative Services
- reassessment of purchasing and financial services
- development of a central computer system

- assessment of and changes to the accounting and audit systems
- creation of a temporary accounting clerk position
- changes to the responsibilities of various employees, e.g. the comptroller
- March 1990 - creation of a permanent accounting clerk position
- May 1990 - departure of the incumbent of the comptroller position
- June 1990 - creation of the position of assistant director, accounting and systems
- June 1990 - abolition of the secretary position
- June 1990 - creation of another accounting clerk position
- August 1990 - hiring of an accounting clerk
- changes in the reporting relationship of the human resources liaison officer

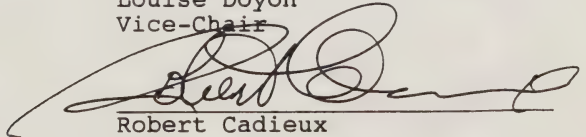
An analysis of the context and sequence in which the position of secretary was abolished leads the Board to conclude that the reorganization of Administrative Services began before and merely continued after the application for certification was filed. Quatre Saisons therefore conducted its operations in accordance with the "business as before" principle.

Consequently, the Board dismissed the complaint.

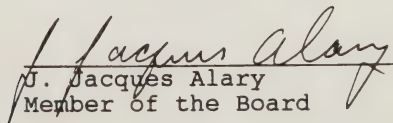
This is a unanimous decision.



Louise Doyon
Vice-Chair



Robert Cadieux
Member of the Board



J. Jacques Alary
Member of the Board

ISSUED at Ottawa, this 28th day of November 1990.

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SUMMARY

DRIVERS AND MISCELLANEOUS WORKERS, LOCAL 69, APPLICANT UNION, PUROLATOR COURIER LTD., EMPLOYER, AND ENERGY AND CHEMICAL WORKERS' UNION, RESPONDENT UNION.

Board Files: 555-2918
555-3056

Decision No.: 834

This case deals with an application seeking the revocation of a representation vote on the ground that said vote was marred by irregularities. On March 21, 1990, the Board had ordered the representation vote among the employees who belonged to the bargaining unit sought to determine if these employees wished to be represented by the Drivers and Miscellaneous Workers, Local 69, or the Energy and Chemical Workers' Union (QFL-CLC).

After having heard the parties, the Board dismissed the application for revocation of the vote because, in its opinion, the noted irregularities were rather trite and there was no cause to doubt seriously that the results of the vote did not accurately ascertain the wishes of the employees involved.

RÉSUMÉ

TEAMSTERS DU QUÉBEC, CHAUFFEURS ET OUVRIERS DE DIVERSES INDUSTRIES, SECTION LOCALE 69, SYNDICAT REQUÉRANT, ET PUROLATOR COURRIER LTÉE, EMPLOYEUR ET DES TRAVAILLEURS DE L'ÉNERGIE ET DE LA CHIMIE, SYNDICAT INTIMÉ.

Dossiers du Conseil : 555-2918
555-3056

Décision n° : 834

Les présents motifs traitent d'une demande d'annulation d'un scrutin de représentation au motif que celui-ci aurait été entaché d'irrégularités. Un scrutin de représentation auprès des employés membres de l'unité de négociation visée a été ordonné par le Conseil le 21 mars 1990 afin de déterminer si ces employés désiraient être représentés par les Teamsters du Québec, chauffeurs et ouvriers de diverses industries, section locale 69 ou par le Syndicat des travailleurs de l'énergie et de la chimie (FTQ - CTC).

Après avoir entendu les parties, le Conseil rejette la demande d'annulation du scrutin puisqu'il est d'avis que les irrégularités constatées sont relativement anodines et qu'il n'y a pas lieu de douter sérieusement que le résultat du scrutin ne témoignait pas fidèlement de la volonté des employés en cause.



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Reasons for decision

Quebec Teamsters, Drivers
and Miscellaneous Workers,
Local 69,

applicant union,

and

Purolator Courier Ltd.,

employer,

and

Energy and Chemical
Workers Union,

respondent union.

Board Files: 555-2918
555-3056

The Board was composed of Mr. J.F.W. Weatherill, Chairman,
as well as Ms. Linda Parsons and Ms. Evelyn Bourassa,
Members.

Appearances:

Mr. Stéphane Lacoste, for the Quebec Teamsters, Drivers and
Miscellaneous Workers, Local 69; and

Mr. Maurice Laplante, for the Energy and Chemical Workers
Union.

These reasons for decision were written by Mr. J.F.W.
Weatherill, Chairman.

A hearing was held in Montréal on August 30, 1990.

In a letter dated March 21, 1990, the Board ordered a
representation vote to be held among employees belonging to
the bargaining unit involved in order to determine whether
these employees wished to be represented by the Quebec
Teamsters, Drivers and Miscellaneous Workers, Local 69 (the
Teamsters), or the Energy and Chemical Workers Union
(QFL-CLC) (the ECWU).

One of the Board's senior labour relations officers was designated as returning officer. Under the agreement between the parties concerning the vote, 15 polling stations were set up throughout Quebec. The voting began in Jonquière on April 17 and ended in Beauceville on May 3, 1990. At the conclusion of the vote at each poll, excluding vote no. 5 (Sept-Iles, where there were two voters), the scrutineers for the parties signed a certificate certifying that all employees entitled and wishing to vote had been recognized and that the vote had been conducted fairly and equitably. At Sept-Iles, no scrutineer represented the Teamsters, the applicant. This union had notified the Board officer of car trouble, but indicated that nothing prevented the vote.

Under the agreement between the parties, the officer counted the vote on May 4, 1990 in Québec, in the presence of the parties' scrutineers. No one questions the propriety of the vote. The results of the vote, as certified by the Board's officer and the scrutineers, are as follows.

Voters	394
Number of votes cast	363
Number of spoiled ballots	6
Number of valid ballots	357
Ballots marked "I wish to be represented by the ECWU"	191
Ballots marked "I wish to be represented by the Teamsters"	166

On May 25, 1990, the applicant filed the present application to annul the vote. It alleged that there were irregularities concerning the sealing of the ballot boxes. Given the nature of these allegations, the Board deemed it appropriate to hold a public hearing, which took place on August 30, 1990. The Board called as a witness the senior

labour relations officer who acted as returning officer and then heard the witnesses called by the other parties. Oral arguments were followed, at the parties' request, by written arguments. The Board received the parties' arguments on September 26 and October 11, 1990.

There clearly were irregularities involving the sealing of the ballot boxes. It is important to note that these ballot boxes have two "covers": a "large" cover for the ballot box itself that is opened when voting begins to show that the ballot box is indeed empty and that remains closed and sealed until the votes are counted, and the "small" cover that covers the slot in which the ballots are placed. In the instant case, there was no problem with the "large" cover which, in the case of each ballot box, was properly closed and sealed until the votes were counted. However, the "small" cover on the majority of ballot boxes used in the vote in question was not properly sealed.

At each polling station, during the first week of voting, when the "small" cover was closed at the conclusion of voting, the seal, instead of being properly affixed, was tied in a knot. It was therefore possible for someone to undo the knot, open the small cover, remove ballots from or add ballots to the box, and then retie the knot. The Board notes the following: (i) the officer had charge of the ballot box at all times: it was either in his sight, locked in the trunk of his car, or in the basement of his house which is equipped with an alarm system; (ii) no proof was adduced that a ballot could be removed through the slot in the ballot box, an assumption we are making for the purposes of this decision; and (iii) when the vote was counted, the number of ballots in the boxes corresponded with the number of ballots recorded, and all these ballots bore the officer's initials, as required.

Any handling of the ballot boxes was done in the presence of the scrutineers who, as we stated earlier, certified that the proper procedure was followed. Objections were raised only after the vote was counted.

The Code provides for the sealing of ballot boxes when a vote is taken. Section 30(1) of the Code reads as follows:

"30.(1) Where the Board orders that a representation vote be taken among employees in a unit, the Board shall

(a) determine the employees that are eligible to vote; and

(b) make such arrangements and give such directions as the Board considers necessary for the proper conduct of the representation vote, including the preparation of ballots, the method of casting and counting ballots and the custody and sealing of ballot boxes."

In the instant case, although the "large" cover was in every case properly sealed, the "small" cover was not for a certain period of time. The Board agrees with counsel for the Teamsters that it has no burden of proving that these irregularities caused it harm. However, it does not believe that these irregularities oblige it to annul the vote and order a new one.

Certainly it is essential that "justice should not only be done, but should manifestly and undoubtedly be seen to be done" (Rex v. Sussex Justices, [1924] 1 K.B. 256, page 259, cited in SITBA v. Consolidated-Bathurst Packaging Ltd., [1990] 1 S.C.R. 282, page 333). However, as Gonthier J. notes, "... This maxim applies whenever the circumstances create the danger of an injustice, for example when there is a reasonable apprehension of bias, even if the decision maker has completely disregarded these circumstances..." (pages 333-334). At issue in Consolidated-Bathurst was the procedure of a tribunal. The maxim concerning the

importance of appearances is often cited in this context. To adapt it to the circumstances of the present case, one must ask the following question: are the irregularities complained of sufficiently serious to warrant the annulment of the vote?

This is how the Board asked the question in CJRC Radio Capitale Ltée (1977), 21 di 416; [1977] 2 Can LRBR 578; and 78 CLLC 16,124 (CLRB no. 89):

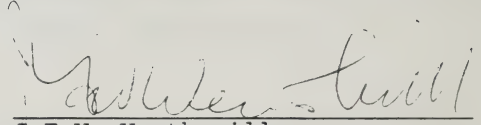
"The holding of a secret vote under the Board's supervision does not, however, provide an absolute and automatic guarantee that the results of the vote will reflect the employees' wishes faithfully. We cannot entirely dismiss the possibility of there being incidents or circumstances that would constitute grounds for doubting that the results of the vote truly attest to the wishes of the employees involved. This is why the Board directed that a new representation vote be held in a case involving the International Association of Machinists and Aerospace Workers, Air Canada and Canadian Air Line Employees Association. Nevertheless, the fact remains that the Board must act on a representation vote unless it is convinced that there are serious grounds for ordering its annulment. The person seeking the annulment of a vote must convince the Board that sufficiently serious irregularities took place to warrant such a decision."

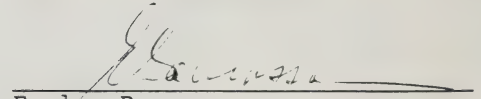
(pages 436; 594-595; and 362-363)

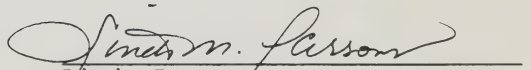
Air Canada (1976), 18 di 66; and 77 CLLC 16,062 (CLRB no. 70), like CJRC Radio Capitale Ltée, involved a complaint of unfair labour practice. In Air Canada, the Board concluded that the employer had interfered in the affairs of a union. The ballots were not counted.

In the instant case, the Board is of the opinion, given the circumstances, that the irregularities that occurred, although regrettable, are relatively harmless and do not warrant the annulment of the vote. There is no substantial reason to conclude that the results of the vote do not faithfully reflect the wishes of the employees in question.

For these reasons, the application to annul the vote is dismissed.


J.F.W. Weatherill
Chairman


Evelyn Bourassa
Member of the Board


Linda Parsons
Member of the Board

ISSUED at Ottawa, this 21st day of November 1990.

CCRT/CLRB - 834

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Summary

DAVID R. HOLLOWAY, COMPLAINANT, AND
CANADA POST CORPORATION, RESPONDENT.

Board File: 950-161

Decision No.: 835

Résumé de Décision

DAVID R. HOLLOWAY, PLAIGNANT, ET LA
SOCIÉTÉ CANADIENNE DES POSTES, INTIMÉ.

Dossier du Conseil: 950-161

N° de Décision: 835

This is a complaint under the safety and health provisions of Part II of the Canada Labour Code against Canada Post Corporation (CPC). The complainant alleged that CPC had terminated his employment contrary to section 147(a) of the Code because he had exercised his rights to refuse to work in a certain place on the grounds that there was danger to his health and safety. CPC denied the allegations.

La présente affaire concerne une plainte portée contre la Société canadienne des postes en vertu des dispositions du Code canadien du travail (Partie II - Sécurité et santé au travail). La plaignant a allégué que la SCP avait violé l'alinéa 147(a) du Code en mettant fin à son emploi parce qu'il s'était prévalu du droit de refuser de travailler dans un endroit précis, au motif que cet endroit présentait un risque pour sa sécurité et sa santé.

The complaint was dismissed. In its reasons, the Board touches briefly upon its approach to these types of situations; however, it found the complaint to be without merit as the complainant had only sought refuge in the protection offered by the Code after his job was in jeopardy because of an ongoing feud with CPC about overtime. This is not a proper exercise of the right to refuse under Part II of the Code.

La plainte a été rejetée. Dans ses motifs de décision, le Conseil a brièvement exposé sa façon d'aborder ce genre de situation. Il a néanmoins jugé que la plainte n'était pas fondée puisque le plaignant n'avait pris de mesures afin de se prévaloir de la protection que lui offrait le Code que lorsqu'une dispute continue avec la SCP au sujet du surtemps eut rendu précaire sa situation d'emploi. Cela ne constitue pas un recours légitime au droit de refus prévu à la Partie II du Code.



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Labour
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Canadien des
Relations du
travail

Reasons for decision

David R. Holloway,
complainant,
and
Canada Post Corporation,
respondent.

Board File No.: 950-161

The Board was composed of Vice-Chairman Hugh R. Jamieson sitting as a single member quorum pursuant to section 156(1) of the Canada Labour Code (Part II - Occupational Safety and Health).

Appearances:

Mr. James Hayes, for the complainant; and
Mr. Ian Szlazak, for Canada Post Corporation.

I

These reasons deal with a complaint under section 133(1) of the Canada Labour Code (Part II - Occupational Safety and Health) which was filed with the Board by Mr. David R. Holloway on October 10, 1990. In his complaint, Mr. Holloway alleged that Canada Post Corporation had terminated his employment contrary to section 147(a) of the Code because he had exercised his rights to refuse to work in a certain place on the grounds that danger existed to himself in or about that place. Canada Post Corporation (CPC or the employer) denied the allegations and a hearing was conducted into the complaint at Toronto on November 13 and 26, 1990. At the conclusion of the hearing the Board announced that it was dismissing the complaint. The following is the Board's rationale for so finding.

II

Mr. Holloway was employed at CPC for approximately 23 years. He had about seventeen years seniority as a letter carrier when his employment was terminated on July 20, 1990. This was one week after Mr. Holloway had called Labour Canada about his refusal to deliver mail to two apartment buildings at 19 and 23 Craighton Drive, Scarborough, Ontario. At that time there was some construction work going on at these premises which prevented Mr. Holloway from using his normal route to deliver the mail. This construction work included the changing of windows in the buildings and some renovations to the front entrances, sidewalks and steps. According to Mr. Holloway he could not use the suggested alternate routes to deliver mail via the rear entrances because of his fear that he would be injured by shards of glass which he said were in the grass at the sides of the buildings. Also, he said he could not gain access to the rear of the buildings using the driveway because of his concern of being injured by motor vehicles which may have been entering or leaving the parking lot. In response to Mr. Holloway's report to Labour Canada on July 13, 1990 an investigation was carried out at the scene on July 16, 1990. The outcome of this investigation by Labour Canada was a decision by a safety officer that danger did not exist as alleged by Mr. Holloway.

If these had been all of the circumstances before the Board, CPC would probably have run afoul of the Code for having disciplined Mr. Holloway in light of the protection afforded employees under section 147(a) of the Code:

"147. No employer shall

(a) dismiss, suspend, lay off or demote an employee or impose any financial or other penalty on an employee or refuse to pay the employee remuneration in respect of any period of time that the employee would, but for the exercise of his rights under this Part, have worked or take any disciplinary action against or threaten to take any such action against an employee because that employee

...

(iii) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part;"

(emphasis added)

This would have been particularly so considering the Board's approach to these types of situations where employees have invoked their right to refuse to work under section 128(1) of the Code which provides:

"128.(1) Subject to this section, where an employee while at work has reasonable cause to believe that

(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or

(b) a condition exists in any place that constitutes a danger to the employee,

the employee may refuse to use or operate the machine or thing or to work in that place."

This Board has said that it is not unreasonable to be wrong where safety and health is concerned and that employees ought not to be discouraged from raising suspicions or fears about danger in the workplace by the imposition of a stringent burden upon them to show at a later date that their refusal was reasonable. Provided that such refusals

are motivated by genuine safety concerns the Board has said that it will ensure that employees receive the full protection offered by Part II of the Code. See William Gallivan (1981), 45 di 180; [1982] 1 Can LRBR 241 (CLRB no. 332); David Pratt (1988), 73 di 218; 1 CLRBR (2d) 310 (CLRB no. 686); Roland D. Sabourin (1987), 69 di 61 (CLRB no. 618); and John Charters et al. (1989), 3 CLRBR (2d) 253 (CLRB no. 727).

In William Gallivan, supra, the Board said that where refusals coincide with other labour relations disputes particular attention would be paid to the circumstances to ensure that the refusals were properly motivated by genuine safety concerns. The Board is of the view that the right to refuse under Part II of the Code should not be abused, nor should this right be used to bring longstanding disputes to a head.

In this case it became clear as the story unfolded that Mr. Holloway's purported refusal to work under section 128(1) of the Code was not solely motivated by safety concerns. Mr. Holloway had been engaged in a running battle with CPC for several months over whether he had to initial his time card when he was claiming overtime. In his own words, Mr. Holloway had embarked on a "work-to-rule campaign" which was ongoing when the renovations to the front entrances at 19 and 23 Craigton Drive commenced on or about July 5, 1990. Prior to this, Mr. Holloway had returned mail to his supervisor, Mr. Richard Papp, almost on a daily basis claiming that he had not had time to finish his walk and, as he was not being paid overtime he was not working any.

On July 5, 1990, Mr. Holloway said that he noted the construction was starting at the front entrances to the buildings and although he had normal access that day, he was told that as of the following day he would have to use the rear door. On July 6, 1990, Mr. Holloway returned the mail for 19 and 23 Craigton Drive to Mr. Papp saying that he was unable to deliver it. When asked about alternate routes Mr. Holloway said that there was no safe way to deliver the mail to these addresses. That day, Mr. Papp delivered the mail himself and, upon checking out the alternate routes, he could see nothing to impede delivery. This was on a Friday afternoon.

On the following Monday, July 9, 1990, Mr. Holloway again returned the mail for 19 and 23 Craigton Drive to Mr. Papp claiming that it could not be delivered because of the construction work. Again Mr. Papp delivered the mail himself with no difficulty.

On July 10, 11 and 12, 1990, Mr. Holloway was off sick. During these three days the mail was delivered to 19 and 23 Craigton Drive by Mr. Holloway's replacement letter carrier with no reported problems.

On July 13, 1990 when Mr. Holloway returned to work, Mr. Papp testified that he advised him that he was giving him a direct order to deliver the mail to 19 and 23 Craigton. This was alleged to have taken place first thing in the morning and, according to Mr. Papp, Holloway left to do his morning deliveries with no comment about safety. Mr. Holloway on the other hand testified that he had had no such conversation with Papp that morning. He denied that he had received a direct order to deliver the mail. In this

regard, I prefer the evidence of Mr. Papp. It is difficult for me to believe that Mr. Papp, having delivered the mail himself to the addresses in question on the 6th and 9th of July and then having a relief carrier deliver it on the 10th, 11th and 12th, would not say something to Mr. Holloway about the delivery to these buildings when Holloway reported back to work on the morning of the 13th. In the balance of probabilities I am satisfied that such a conversation took place.

In any event, Mr. Papp went on to testify that the next time he saw Mr. Holloway on the 13th was about 12:50 p.m.. Holloway was on the phone to Labour Canada and he asked Mr. Papp to take the phone and talk to the person at Labour Canada. Mr. Papp said that he did take the phone and explained the whole situation to the Labour Canada representative. He also offered to have a safety officer from Labour Canada attend the scene there and then to investigate the matter. However, Mr. Holloway refused to participate in an investigation at that time because he said this would incur overtime and as he was not being paid overtime he would not attend. As was indicated earlier, the investigation did take place on July 16 with the result being a no danger finding. Even then, Mr. Holloway did not participate in the investigation, he appointed a union representative to take his place while he carried on with his normal morning deliveries.

III

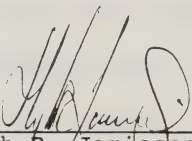
Mr. Kenneth Thorne, Zone Manager of CPC's York Division, was the CPC official who made the ultimate decision to terminate the employment of Mr. Holloway. Mr. Thorne's testimony

before the Board was forthright and candid. He explained how he had wrestled with the problem of what to do about Mr. Holloway and his ongoing individual vendetta against CPC. In June of 1990 Mr. Thorne had already handed out a ten-day suspension to Mr. Holloway as a result of his continued refusal to complete his delivery schedule. Mr. Thorne said that he had considered discharge at that time, however, because of Mr. Holloway's long service and past performance with CPC he had decided to assess only a ten-day suspension. With the view of persuading Holloway to mend his ways, the suspension was delayed until December 24, 1990. If Mr. Holloway was not involved in any further infractions or misconduct between June 1990 and December 24, 1990 he would not have to serve the delayed suspension and the record of the discipline would be removed from his personal file. The letter dated June 27, 1990 conveying the foregoing information to Mr. Holloway ended with a caution, "Any further acts of major misconduct you will be discharged from the Corporation".

When faced with the conduct of Mr. Holloway over the construction and his refusal to use the alternate delivery routes at 19 and 23 Craigton Drive, Mr. Thorne said that he concluded that there was no option but to dismiss Mr. Holloway. This he did reluctantly considering Holloway's years of service. Mr. Thorne stated unequivocally that he did not fire Mr. Holloway because he had exercised his rights under Part II of the Code and, in the given circumstances I accept Mr. Thorne's word.

It is my opinion that Mr. Holloway's refusals to use the alternate routes for delivery of mail to 19 and 23 Craigton Drive were part and parcel of his ongoing feud with CPC over the overtime issue. When he saw the writing on the wall on

July 13, 1990 and, knowing that he was about to be disciplined for his actions which would probably result in dismissal considering his recent caution in June 1990, Mr. Holloway sought refuge in Part II of the Code. By contacting Labour Canada at that late date, he attempted to gain the protection of the Code to avoid the inevitable. This is not what the right to refuse under the Code is all about. It is my finding that the complaint has no merit and it is dismissed accordingly.



Hugh R. Jamieson
Vice-Chairman

DATED at Ottawa this 30th day of November, 1990.

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SUMMARY

COMMUNICATIONS AND ELECTRICAL WORKERS OF CANADA, KHALED MALOUM AND LOUISE ARBOUR, COMPLAINANTS, AND NATIONAL PAGETTE, EMPLOYER.

Board Files: 745-3679
745-3680
745-3681

Decision No.: 836

RÉSUMÉ

LE SYNDICAT DES TRAVAILLEURS ET TRAVAILLEUSES EN COMMUNICATION ET EN ÉLECTRICITÉ DU CANADA (CTC-FTQ), ET KHALED MALOUM ET LOUISE ARBOUR, PLAIGNANTS, ET NATIONAL PAGETTE LIMITÉE, EMPLOYEUR.

Dossiers du Conseil : 745-3679
745-3680
745-3681

Décision n° : 836



Having determined that National Pagette, which offers telephone answering, message management, data information and paging services, was a federal work, undertaking or business within the meaning of section 2 of the Code, the Board declared it had constitutional jurisdiction to hear the three complaints of unfair labour practice it had received.

After having reviewed the relevant case law, and in particular Re Regulation and Control of Radio Communication in Canada, [1932] A.C. 304, and Alberta Government Telephones v. Canada (Canadian Radio-Television and Telecommunications Commission), [1989] 2 S.C.R. 225, the Board determined that National Pagette carried out interprovincial telecommunications activities. Customers of National Pagette are provided on-going and regular communication services established on a national or interprovincial network basis through a) electromagnetic waves that extend beyond the border of a single province, and b) use of integrated radio and telecommunication technologies.

Le Conseil, saisi de trois plaintes de pratiques déloyales, a déterminé que la compagnie National Pagette Limitée, qui offre des services de répondeur, de gestion des messages, de services de données informatisées et de téléappel, est une entreprise fédérale au sens de l'article 2 du Code et qu'il a la compétence constitutionnelle pour instruire ces plaintes.

Après avoir fait une revue de la jurisprudence pertinente, en particulier des arrêts Re Regulation and Control of Radio Communication in Canada, [1932] A.C. 304, et Alberta Government Telephones c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes), [1989] 2 R.C.S. 225, le Conseil a décidé que National Pagette exerce des activités de télécommunications interprovinciales. L'entreprise offre à ses clients un service de réseau national ou interprovincial de communications de façon continue et habituelle au moyen: a) d'utilisation d'ondes électromagnétiques qui dépassent les frontières d'une seule province et b) d'utilisation intégrée de différentes techniques de radio et de télécommunications.

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Reasons for decision

Communications and Electrical
Workers of Canada (CLC-QFL),
Khaled Maloum and Louise
Arbour,

complainants,

and

National Pagette Ltd.,

employer.

Board Files: 745-3679
745-3680
745-3681

The Board consisted of Ms. Louise Doyon, Vice-Chair, and
Ms. Ginette Gosselin and Mr. François Bastien, Members.

Appearances:

Mr. Pierre Grenier, for the Communications and Electrical
Workers of Canada (CLC-QFL); and

Mr. Robert D. Watson and Ms. Sylvie Graton, for the
employer.

PRELIMINARY DECISION ON THE BOARD'S

CONSTITUTIONAL JURISDICTION

These reasons are further to an interim decision issued on
November 6, 1990, pursuant to section 20(1) of the Code, in
which the Board determined that the company, National
Pagette Ltd., is a federal work, undertaking or business
within the meaning of section 2 of the Code and that the
Board has the required constitutional jurisdiction to deal
with the complaints of unfair labour practice before it.

Hearings on this issue were held at Montréal on October 3,
4 and 5, 1990.

It will be necessary to summarize the circumstances that gave rise to that decision to understand fully the procedure followed in this case.

I

The Context of the Decision

1. The Procedure

On May 8, 1990, the Communications and Electrical Workers of Canada (CLC-QFL) (the union) applied to the Board for certification to represent a group of employees of National Pagette Ltd. (the employer). The union proposed the following description:

"All employees of National Pagette Ltd. working in the Quebec region with the exception of employees working in sales, persons employed in a confidential capacity in matters relating to industrial relations and those in the Québec and Ottawa branches, but including the technicians at those two branches.

*At 5160 Décarie Blvd., Montréal, Quebec H3X 2H9
4040 Ste-Catherine West, Montréal, Quebec H3Z 1P2
895 Charest Blvd. West, Québec, Quebec G1N 2C9
200 Catherine St., #202, Ottawa, Ontario K2P 2K9."*

(translation)

Upon receipt of this application for certification, a labour relations officer of the Board was appointed to carry out the usual investigation. The purpose of such investigations is to ascertain that the provisions of the Code have been observed and applied with respect to both the representativeness of the union and the appropriateness of the bargaining unit. To that end, the officer must obtain relevant information on the general nature of the undertaking's activities and on the specific methods by which and conditions under which those activities carried out. This information is necessary not only for

determining the appropriate bargaining unit but also for establishing the Board's constitutional jurisdiction, that is, whether the application for certification really affects a federal work, undertaking or business within the meaning of section 2 of the Code.

On June 27, 1990, the union and two of its members filed three complaints of unfair labour practice. In its complaint, the union alleges that the employer interfered with the union's formation and administration activities during the union organizing campaign and tried to influence the employees' decision on joining the union, thus violating section 94(1)(a) of the Code. As for the two employees, Khaled Maloum and Louise Arbour, they complain that the employer took discriminatory and unlawful disciplinary action against them for carrying out union activities protected by the Code, thus violating sections 94(3)(a)(i), 94(3)(a), 94(3)(e), 96 and 97 of the Code.

On July 13, 1990, the Board summoned the parties to public hearings on the three complaints. In view of the high priority given these proceedings, the hearings were set for August 29, 30 and 31, 1990.

On July 20, 1990, the Board received two requests from counsel for the employer. In the first, the employer requested that the application for certification be heard before or, at the very least, at the same time as the complaints of unfair labour practices. In support of this request, counsel submitted that the employer had a right to a fair hearing so as to enable it to adduce full evidence on all issues before the Board. As of that date, the investigation concerning the certification application was under way and the two parties had already sent the Board

some of their submissions on the appropriateness of the bargaining unit and employees affected. The Board did not agree to this request for a public hearing. In its written reply, the Board repeated the rule with respect to public hearings in certification matters as follows:

"Please note that the hearings scheduled for August 29 to 31, 1990 concern only the unfair labour practice complaints (files 745-3679, 745-3680 and 745-3681). At this time, the Board does not intend to hear evidence on other matters at those hearings. The Board will decide whether or not a hearing is necessary to deal with any matters raised in the certification file after the officer has completed his investigation and submitted his report to the Board and to the parties.

As mentioned in our letter of May 10, 1990, the Board is not required to hold a public hearing in the case of an application for certification, and most often renders its decisions based on the written representations of the parties and on the results of such other inquiries as it has determined to be necessary. For this reason, it is important that the parties file detailed written representations on all issues they wish to address."

The Code and the relevant jurisprudence are clear: the Board is not required to hold a public hearing on certification matters. The Board can render a decision based merely on the parties' written submissions. The parties are notified of this possibility at the beginning of the investigation and they must then file all their submissions in writing. The Federal Court of Appeal has confirmed this procedure several occasions (see C.S.P. Foods Ltd. v. Canada Labour Relations Board et al., [1979] 2 F.C. 23; and Canadian Arsenal Limited v. Canada Labour Relations Board, [1979] 2 F.C. 393). More recently, on October 16, 1990, the Federal Court of Appeal refused in Woodward's Limited v. International Association of Machinists and Aerospace Workers, file no. A-138-90, to review a certification order issued by the Board without a public hearing when the applicant, although aware that there was no obligation to

hold a public hearing, had failed to file all of its submissions in writing. The Court held:

"... It proceeded with the application according to the announced procedure.

The Board, in my view, was entitled to act the way it did."

(page 7)

The second request from counsel for the employer was to have the hearing of the complaints postponed until the beginning of September because of a scheduling conflict. The Board granted this request and postponed the hearings concerning the three complaints until September 5, 6 and 7.

In the meantime, in mid-August 1990, the Board, still in the context of its investigation concerning the certification application, requested the employer to provide it with additional information on the nature and activities of National Pagette Ltd. so as to complete its investigation into whether the company was a federal or provincial undertaking. After it had received a reply, which clarified certain aspects of the undertaking's activities, from the director of the Quebec regional office on August 21, 1990, the Board requested the employer on August 23, 1990 to provide it with additional information on the nature of National Pagette's relationship with Bell Canada along with its submissions on the undertaking's federal nature.

Counsel for the employer followed up on this last request by the Board. It was at this time that the employer challenged the Board's constitutional jurisdiction for the first time in relation to either the certification application or the unfair labour practice complaints. According to it, the requests for information by the Board

officer raised the issue of the Board's constitutional jurisdiction. In its reply of August 28, the employer presented the constitutional position it had decided to adopt as follows:

"Upon review and consideration of this issue National Pagette takes the position that unless and until there is a final and binding determination that the Board has jurisdiction and that the Canada Labour Code does apply to National Pagette, the Board has no jurisdiction or authority to conduct any proceedings or to take any action including without limitation matters related to the certification application and the three unfair labour practice complaints.

The Union is asserting that the Canada Labour Code applies to National Pagette. National Pagette submits that the burden of proving federal jurisdiction and the application of the Canada Labour Code over a particular activity or employment, in this case the Industrial Relations of National Pagette, rests with the party who asserts federal jurisdiction, namely the Union.

In the end, after having stressed that this issue was preliminary, serious and complex in nature and that a public hearing requiring lengthy preparation would be needed to determine it, counsel for the employer concluded with a request that the hearings scheduled to begin on September 5 be postponed. Following exchanges between the Board and the parties on this matter, the Board decided to hear the parties, not with respect to the three complaints for which hearings had already been scheduled, but on the issue of its constitutional jurisdiction.

In its notice, the Board explained the framework of the evidence and questions with respect to which it wanted to hear evidence from the parties on the constitutional issue. It also advised them that, given the nature of the evidence requested, it would hear the employer first. It said the following in its letter of August 30, 1990:

"At the hearing, the Board wishes to receive from the parties information not only concerning the general nature of the activities of the company, but more specifically, details on the methods and conditions of operation of the company, in order to permit the Board to determine whether National Pagette operates a telecommunications company over which it has jurisdiction. On this point, the Board refers the parties to a letter decision of May 4, 1989 in file 555-2752 concerning National Mobile Radio Communications Inc. which may serve as a general framework to establish the elements on which the Board wishes to be further informed.

For this purpose, and given the nature of the information requested, the Board will hear the employer first concerning the aforementioned matters.

The Board reminds the parties that they should also be ready to proceed on the merits of these complaints on September 6 and 7, 1990."

The hearing of September 6 was postponed at the joint request of the parties, who wanted to continue their discussions on the questions at issue.

2. The Progress of the Hearings

At the beginning of the hearings in October 1990, the Board decided to issue a preliminary decision on its constitutional jurisdiction before hearing the three complaints on their merits. It clearly explained, even though this seemed obvious, that this decision would also apply to the certification application.

The Board dealt with two questions before beginning to hear the evidence. The first pertained to a list of documents prepared by the Board and given to the parties at the beginning of the hearings.' These documents were already included in either the certification file or the complaint files and, with one exception, originated with either the parties or the Board. The Board's intention in gathering these documents and referring expressly to them at the

beginning of the hearing was to remind the parties of the information already in its possession on the constitutional issue, and to ensure that everyone entered the discussion on even ground. The Board notified the parties that it would hear them if they wanted to challenge the relevance, accuracy or admissibility in evidence of the information contained in those documents on file.

The documents in question refer to the nature of the undertaking's activities (the application for certification, the employer's reply to that application, the replies of August 21 and 28, etc.) or to the holding and progress of the hearings. The document originating with neither the parties nor the Board is a letter from the federal Department of Communications dated August 29, 1990, which confirms that National Pagette Ltd. has licences for operating a public radio paging system. There are three documents attached to this letter. First, there is a list of station locations and call signs used by National Pagette that come under the Department's Montréal District Office. Then there are two informative and explanatory documents originating with the Department's Telecommunications Policy Branch, the first of which concerns spectrum policy principles related to spectrum utilization and radio system policies while the second concerns the radio systems policy for radio paging. Upon receiving these documents on August 29, 1990, the Board transmitted a copy to each of the parties.

Counsel for the employer challenged this procedure and submitted that the Board, in determining the constitutional issue, was limited to considering evidence produced at the public hearings. The Board dismissed this claim and repeated that the purpose of its decision to hold a public

hearing on the constitutional jurisdiction issue was to add to the information already in its possession. Moreover, since the parties were already aware of that information, the hearings provided them with another opportunity to comment on it, to add to it or to challenge it. The purpose of holding a public hearing at this time was therefore to complete the investigation and obtain information from the parties in addition to that already obtained through written exchanges. This is the framework the Board had established in its letter of August 30, 1990, and each of the parties had the opportunity to submit any evidence it considered useful.

In referring to information in a parallel file, in this case the certification file, concerning the same parties, the Board was following an established and recognized practice according to which it can, in carrying out an investigation or issuing a decision, refer to any relevant information of which it is aware and to information provided by the parties in any files involving the same parties. This procedure applies to a dispute of any type. (See Nordair Ltd. (1985), 62 di 88; 10 CLRBR (NS) 107; and 85 CLLC 16,051 (CLRB no. 525); Iberia Airlines of Spain (1988), 74 di 1 (CLRB no. 687); William E. Blonski (1984), 56 di 222; 8 CLRBR (NS) 111; and 84 CLLC 16,054 (CLRB no. 476); Tandy Electronics Ltd. (Radio Shack) v. United Steelworkers of America et al. (1980), 80 CLLC 14,017 (Ont. H.C.J.).)

The second question the Board had to answer dealt with the burden of proof, as it had indicated in its letter of August 30 that it would hear the employer first. Counsel for the employer objected to this procedure and repeated its claim that the burden of proof rested with the union and with the complainants: since they decided to go before the

Board, they had to prove that they had chosen the right forum.

After hearing and considering the arguments of counsel for the employer, the Board upheld its decision to hear the employer's witnesses and arguments first. The Board can establish the order in which the evidence and witnesses are heard while at the same time ensuring compliance with the rules of natural justice, which it had done here. The objective is to adopt a procedure that enables the Board to obtain all information relevant to deciding the question before it. The Board is master of its own procedure. (See Baron W. Lewers (1982), 48 di 83; and 82 CLLC 16,179 (CLRB no. 372); and Nordair Ltd. (1986), 64 di 118 (CLRB no. 560). See also Hoffman-La Roche Limited v. Delmar Chemical Limited, [1965] S.C.R. 575; Komo Construction Inc. v. Commission des relations de travail du Québec, [1968] S.C.R. 172; Julius Kane v. Board of Governors of the University of British Columbia, [1980] 1 S.C.R. 1105; and James Lipkowitz et al. v. C.R.T.C. et al., [1983] 2 F.C. 321.)

In this case, the employer, when requested to provide information within the normal framework of the investigation, decided to challenge the Board's constitutional jurisdiction. Although that objection was belated, it had to be decided. In view of the circumstances of the case, the Board decided to hear the parties. Since the employer was in possession of any useful and relevant information on the nature of the undertaking's activities, and especially of those related to the methods and conditions of carrying out the undertaking's activities, the Board requested it to present its evidence first. This procedure in no way had the effect, and the Board explained this at the hearing, of requiring the employer to prove that

the Board did not have constitutional jurisdiction to hear these complaints. On the contrary, the Board has to be satisfied that it has constitutional jurisdiction, which is exceptional in the field of labour relations, and took the appropriate action in deciding to hear the parties. If it is not so satisfied, the Board must refuse to hear the complaints of unfair labour practice.

In this case, both parties had the opportunity to present all witnesses of their choice and to file all documentary evidence and all submissions they deemed relevant. After deliberation and consideration, the Board is satisfied that it has constitutional jurisdiction, and it so notified the parties in its interim decision of November 6.

II

The Evidence

The Board heard four witnesses. First, the employer called Carolyn Ross, Vice-President of Operations for National Pagette Ltd., as a witness. She explained in part the nature of the company's activities along with the characteristics and operation of the various communications means used to carry out its commercial activities. Sam Tilden, a retired radio engineer and consultant who has worked with the employer in designing and planning projects involving the use of electromagnetic waves, was heard next. He explained in detail the various types of electromagnetic waves along with the characteristics of the transmission modes of those waves; he dealt in detail with the stages of scientific and technological progress in this field over the last 60 years.

As for the union, it called two witnesses. Sylvain Gadoury, an electronics technician, is assigned to the installation, programming and maintenance of National Pagette's terminals. He explained to the Board how the company's various terminals in Canada are programmed and how that programming makes it possible to connect them to each other to offer clients a service known as a nationwide network. Sylvain Leblond is a technician specialized in electronic telecommunications. As a network technician for National Pagette Ltd., he installs and maintains the different relay equipment (transmitters, repeaters, etc.) used by the company. During his testimony, he explained to the Board how the electromagnetic waves received and transmitted by this equipment, which belongs to the company, in two provinces cross the borders of those provinces.

The following evidence concerning the nature of the undertaking's activities and the means of carrying out those activities can be drawn from the testimony.

1. Corporate Structure

National Pagette is, through the BCE Mobile group, part of the BCE Inc. family. BCE Inc. owns 69.7% of the shares of BCE Mobile, a holding company that, through its operating subsidiaries, offers communications services and operates mobile communications systems.

National Pagette holds a large share of the capital stock of the following companies:

- 60% of Message Air of Trois-Rivières, Quebec, a company offering answering and paging services;

- 70% of a Montréal-based numbered company offering answering and paging dispatch services;
- 49.9% of Allô Services of Québec, which provides similar services and serves metropolitan Québec (in turn, this company owns 30% of the numbered company mentioned above, which gives National Pagette effective control of 85% of that company);
- 100% of a Toronto-based numbered company operating an alarm monitoring centre;
- 100% of another numbered company offering leasing services (location not specified).

2. Organizational Structure

National Pagette's organizational structure has both national and regional (provincial) aspects. There are three services at the national level - finance, market planning and operations - each of which is headed by a vice-president. The Vice-President of Operations explained that decisions related to prices and to promotions are made at the national level. At the regional level, the company is made up of four geographic divisions - Quebec, Ontario/Manitoba, Alberta and Vancouver - in addition to a branch in Victoria. Each division is managed by a director who reports directly to the president. These divisions typically feature authority over administration and sales through local directors.

Technical services are provided nationally through the authority of Carolyn Ross, Vice-President of Operations. Regional directors of technical services report to a

national director general and not to the directors of their regions.

3. Products, Services and Operations

Ms. Ross testified that National Pagette's business is one of personal communications and information services. It relays information and facilitates personal communications in various ways, such as answering the telephone, taking messages and forwarding them by means of a range of technologies, including paging. The company defined its main activities as follows in its correspondence to the Board dated August 21, 1990.

a) Answering and message management services. These are provided to its clients by means of automated and manual systems and include information and message use, storage, retrieval and delivery. In the circumstances, these include all services needed to transmit information to people one wants to contact, i.e. paging, scheduling of appointments for businesses and professionals, and central alarm services for fires and for the security of facilities and ~~residential~~

b) Data information services. Clients receive numeric or alphanumeric data on the miniature display boards of their pagers. The information transmitted in this way might be a message from a client or current stock market information.

c) Paging services. National Pagette transmits information to clients by means of tone or voice equipment and by numeric or alphanumeric display. This is carried out by various technologies, including computer systems, telephone lines, radio signals and pagers.

These services are offered to clients in a great variety of forms and combinations according to each client's specific needs. Subscriptions vary from a basic paging service to organizing meetings and include receiving messages, voice mailboxes, stock market information and, in the case of a smaller clientele (fewer than 1 000 subscribers) confined to a few centres in Quebec and Ontario, cellular telephones under an agreement with Bell Cellular. These services are currently offered, in whole or in part, to some 130 000 clients throughout Canada. The corresponding figures for the Quebec region are 40 000 subscribers for the various paging services and 4 000 for the answering services.

The evidence also reveals that, in addition to integrated marketing services, there is in fact a large degree of operational integration. According to Ms. Ross, this integration manifests itself in particular through (a) a computer link between the answering and paging services, (b) interaction between answering service staff and operations and sales staff so as to develop systems tailored to the special needs of large businesses, (c) the fact that the same people are often responsible for both sales and service for paging and answering activities, and (d) the fact that the same person is responsible for both billing and collection regardless of the nature of the service in question.

4. The Technology

The evidence of various witnesses, and especially of Ms. Ross and Mr. Tilden, confirms that paging services are, from an operational point of view, dependent upon a wide range of different technologies, that is, computer systems, telephone lines, radio signals and paging devices. The

following is a more detailed presentation of this multiplicity of technological means.

(a) The transmission process. Setting aside a few differences that can be attributed to the various types of pagers used, the transmission process is as follows. The client dials the number of the answering service of the person or business he wants to contact. That call is forwarded to the answering service via the telephone company's regular circuits and ends up at National Pagette's computer terminal. The computer identifies the pager concerned and transmits the information via the telephone circuits to a HUB transmitter, which relays it to a repeater. The repeater transmits the signal to the pager at the pager's particular frequency. Signals from the HUB to the repeater and from the repeater to the pager are transmitted via electromagnetic waves. When the pager receives the repeater's signal, it gives off a characteristic tone, and the person to whom the message is directed then calls the answering service to ask for the content of the message.

(b) The paging equipment. Variations in the process described above are due to the different types of equipment used by clients. In addition to tone pagers, the company also offers other types of equipment, that is, numeric and alphanumeric display pagers. The numeric pager has a small display of numbers, but the transmission process is basically the same as for the tone pager. Tone and numeric pagers are also available with a voice message option, which means that a subscriber can call the automated answering service or his voice mailbox directly to get his message. The alphanumeric pager is capable of displaying some 80 characters (numbers or letters), and the transmission

process is consequently more complicated in that it requires direct computer links between the two ends of the chain by means of modems. Thus, the person to be contacted needs an interface with the National Pagette terminal. Finally, the voice model can record a message received and retained in the "system"; it can relay the message via the same transmission process used to receive it.

(c) The physical facilities. Most of the information supplied in evidence on this aspect of relaying pager signals has been drawn from Sam Tilden's lengthy testimony.

The possible configuration of the equipment used for transmitting electromagnetic waves must meet specific requirements based on the physical characteristics of those waves. Thus, electromagnetic waves with a frequency higher than 50 MHz (which is the case with pager signals) travel or spread in a straight line, contrary to those of lower bands, that is, those with low or very low frequencies, which use the ground as a conductor and therefore travel in curved lines. This characteristic explains why the UHF and VHF waves used for paging are limited between antenna and receiver to the line of sight or to the horizon distance plus 30%. This distance is itself affected by the height of the antenna and of its base. For example, the line of sight over a lake might be 4 miles; if you climb to the 100-foot elevation, however, it becomes 15 miles and so on, in accordance with the law of diminishing returns. Thus, it is possible in Alberta to transmit a signal 100 miles from one mountaintop to another without relay stations. These distances are much shorter in practice, which explains why equipment is needed to amplify signals over great distances. Another consequence is, of course, the need to use more

economical transmission technologies, such as telephone circuits, over long distances.

The equipment network set up by National Pagette attests to these technological and economic requirements. Metropolitan Montréal is served by such amplification equipment consisting of a network of HUB transmitters and drop repeaters in addition to computer links. But, in long-distance paging - between Montréal and Sherbrooke, for example - a signal duly converted into the network's computer language is forwarded via the telephone circuits; at its destination, the signal is received, processed electronically and then transmitted by means of National Pagette's radio bands.

(d) Extraprovincial activities. Although National Pagette has tried to minimize the extraprovincial dimension of its activities, the testimonial and documentary evidence shows that there are continuous interprovincial connections between the company's various activities. They can be identified as follows.

(i) The transmission equipment. Mr. Tilden applied himself to demonstrating that at the current state of technology makes it possible to contain transmitted VHF and UHF signals within narrow spatial limits. However, this does not mean that they do not cross provincial borders. The evidence adduced by the complainants indicates otherwise. According to Mr. Leblond, tests have revealed that signals transmitted from National Pagette's tower at Mont-Orford were in fact received on the other side of the American border. In addition, clients travelling between Montréal and Ottawa receive paging signals from either side of the Ontario-Quebec border. For example, a client in Hawkesbury,

Ontario, receives his signal from Montréal, whereas one in Hull, Quebec, receives it from Ottawa. As Mr. Tilden pointed out, the choice of sites for signal amplification equipment is based on strictly technical criteria; thus, as is shown in the above examples, the first requirement of this decision is not dictated by borders but by the characteristics of transmission physics. No one proved, or even tried to prove, that this situation was an isolated case.

(ii) The network service. In February 1989, National Pagette set up a service enabling a client to receive his messages in more than one city. Thus, someone from Montréal who has to travel frequently to Vancouver and Toronto is offered the option of subscribing to a paging service for all three of those cities. There is a detailed description of the system and of the necessary equipment in an internal document of the company filed by the complainant (Exhibit no. 22), various parts of which were described by Sylvain Gadoury.

This technology provides uninterrupted paging services for subscribers who travel between the network's cities. In order to do this, the company uses a system that links the paging system's computer terminals into a nationwide network. Any tone, numeric or alphanumeric pager can be integrated into it. Once it has been programmed, the interconnection of terminals is ensured via reserved DATAPAC telephone circuits, which are rented from Telecom Canada or from provincial telephone companies. Paging signals are forwarded according to the code of a given region. The various regions (or groups of cities) are identified by different codes (C/R).

National Pagette offers a wide range of regions (or groups of cities) to meet its clients' varying needs. The most extensive service, that designated by code C/R 25, which is mentioned in the internal document, includes the following cities:

Vancouver/Vancouver Island, Calgary/Red Deer/Edmonton corridor, Lethbridge, Saskatoon, Regina, Winnipeg, Southern Ontario, Ottawa, Montréal/Québec corridor, Chicoutimi, Saint John/Charlottetown, Halifax.

At a more restricted level, there are, for example, following geographic regions:

C/R 26: Vancouver/Vancouver Island, Calgary/Red Deer/Edmonton corridor, Lethbridge, Saskatoon, Regina, Winnipeg.

C/R 27: Winnipeg, Southern Ontario, Ottawa, Montréal/Québec corridor, Chicoutimi, Saint John/Moncton, Charlottetown, Halifax.

This network service, which has been offered for a little less than two years, represents 7/10 of 1% of the company's total income and affects 1.5% of its clients.

With respect to equipment, National Pagette owns and operates computer facilities in most of the Canadian cities it serves with the exception of Val-d'Or, Saint John and Halifax where it rents from the local telephone companies. In addition, National Pagette owns and maintains radio transmission equipment in all of Canada's major centres. As such, it holds licences issued by the federal Department of Communications for each HUB transmitter, each repeater and each frequency used. It should also be noted that the telephone circuits are an essential link in the operation of the company's nationwide communications network. It has signed agreements with Telecom Canada and with other

provincial telephone undertakings for the use of dedicated telephone lines.

(iii) The cellular telephone option. This type of service enables subscribers in Ontario and Quebec to benefit from both paging and message management systems and cellular telephones. The network currently being served includes Montréal-Québec-Chicoutimi-Ottawa, and the number of subscribers is approximately 1% of National Pagette's total number of subscribers.

III

The Claims of the Parties

The arguments of the parties in support of their claims can be summarized as follows.

1. The Position of the Applicants

The union and the complainants submit that National Pagette is a radiocommunications undertaking subject to federal jurisdiction. To this end, they refer to Re Regulation and Control of Radio Communication in Canada, [1932] A.C. 304, and to a Board decision involving an undertaking whose activities are similar to those of National Pagette (see National Mobile Radio Communication Inc., May 4, 1989 (LD 723)).

Moreover if the federal nature of the undertaking is not established by Re Regulation and Control of Radio Communication in Canada, supra, the complainants submit that National Pagette is, according to the tests adopted by the Supreme Court in Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications

Commission), [1989] 2 S.C.R. 225, a federal undertaking on the basis of the nature of the services it offers, the regular and continuous nature of its interprovincial activities, the technological means it employs (waves, telephone and computer) and its operating methods.

2. The Position of National Pagette

National Pagette submits that it operates an undertaking of an exclusively provincial nature governed by sections 92(13) and 92(16) of the Constitution Act. It puts the following evidence forward in support of this statement.

The company's corporate structure is not relevant in determining whether its activities are federal or provincial in nature; nor is the fact that it operates on a local basis in several provinces.

National Pagette's interprovincial paging activities represent a small percentage of its overall activities and cannot be used to characterize it. National Pagette is merely a user of already existing telecommunications systems and does not carry out telecommunications activities.

The fact that National Pagette uses electromagnetic waves to carry out its activities does not make it a federal undertaking. Re Regulation and Control of Radio Communication in Canada, supra, cannot apply to this case in view of the progress achieved since then in the use and control of electromagnetic waves within a specific area. That judgment therefore cannot serve as a basis for federal jurisdiction for all radiocommunications activities. Moreover, National Pagette's activities can be distinguished

from those of National Mobile, which the Board has already held to be a federal undertaking.

In the alternative, National Pagette submits that, although it might be subject to federal legislation in some respects, this is only on an incidental basis; its activities remain essentially provincial.

IV

The Decision

1. The Applicable Rules

(a) The Law

Section 4 of the Code defines its scope of application:

"4. This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers."

Section 2 defines the expression "federal work, undertaking or business":

"2. ... any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,

(a) a work, undertaking or business operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada,

(b) a railway, canal, telegraph or other work or undertaking connecting any province with any other province, or extending beyond the limits of a province,

(c) a line of ships connecting a province with any other province, or extending beyond the limits of a province,

(d) a ferry between any province and any other province or between any province and any country other than Canada,

(e) aerodromes, aircraft or a line of air transportation,

(f) a radio broadcasting station,

(g) a bank,

(h) a work or undertaking that, although wholly situated within a province, is before or after its execution declared by Parliament to be for the general advantage of Canada or for the advantage of two or more of the provinces, and

(i) a work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces."

The Supreme Court of Canada, which recognized the validity of these provisions in Re Eastern Canada Stevedoring Company Limited, [1955] S.C.R. 529, explained their origins as follows:

"... The enumeration in paragraphs (a) to (h) inclusive is not to restrict 'the generality of the foregoing', but, taking in order the subjects listed, the matters coming within paragraph (a), subject to a reservation hereafter mentioned, are referable to Head 10 of s. 91 of the British North America Act, 'Navigation and Shipping'; the matters within paragraphs (b) and (c) are referable to Head 10 of s. 92 and, therefore, by virtue of Head 29 of s. 91, are within the exclusive legislative authority of Parliament; those within paragraph (d) are referable to Head 13 of s. 91 'Ferries between a Province and any British or Foreign Country or between Two Provinces'; those within paragraph (g) are referable to Head 10(c) of s. 92 and again, therefore, by Head 29 of s. 91, within the exclusive legislative authority of Parliament; paragraphs (e) and (f) have been placed under the jurisdiction of Parliament by juridical interpretation and (h) is merely an omnibus paragraph. ..."

(pages 534-535)

Section 2(b) of the present Code, to refer only to the section at issue here, corresponds to section 53(b) of the Industrial Relations and Labour Disputes Investigation Act,

whose legality was challenged in Re Eastern Canada Stevedoring Company Limited, *supra*.

Section 1 of the Radio Act, R.S.C., 1985, c. R-2, defines radiocommunication, broadcasting and telecommunication as follows:

"'radiocommunication' or 'radio' means any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by means of electromagnetic waves of frequencies lower than 3 000 GHz propagated in space without artificial guide.

'broadcasting' means any radiocommunication in which the transmissions are intended for direct reception by the general public.

'telecommunication' means any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by wire, radio, visual or other electromagnetic system."

b) The Case Law

The Supreme Court recently summarized, in Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission), *supra*, the principles of constitutional law found in the case law that make it possible to determine the sphere of jurisdiction applicable to an undertaking.

"The case law clearly establishes that if a work or undertaking falls within s. 92(10)(a) it is removed from the jurisdiction of the provinces and exclusive jurisdiction lies with the federal Parliament (City of Montreal v. Montreal Street Railway, [1912] A.C. 333 (P.C.) (hereinafter Montreal Street Railway), at p. 342; Attorney-General for Ontario v. Winner, [1954] A.C. 541 (P.C.) (hereinafter Winner), at p. 568).

In Northern Telecom Ltd. v. Communications Workers of Canada, [1980] 1 S.C.R. 115 (hereinafter Northern Telecom, 1980), this Court outlined the appropriate constitutional principles for determining whether legislative authority over the labour relations of employees lies in the federal or provincial sphere. The issue was whether the supervisors of installers of telecommunications equipment fell under the federal government's

jurisdiction. The Court declined to answer the question because of a nearly total absence of necessary constitutional facts. The Court did, however, state the appropriate framework of analysis in cases involving a similar issue. The Court adopted and summarized an earlier discussion on this point by Beetz J. in Construction Montcalm Inc. v. Minimum Wage Commission, [1979] 1 S.C.R. 754. Two of the six principles outlined in Northern Telecom, 1980 at p. 132 are relevant here:

'(5) The question whether an undertaking, service or business is a federal one depends on the nature of its operation.

(6) In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of "a going concern", without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity.'

There is ample authority for the proposition that the crucial issue in any particular case is the nature or character of the undertaking that is in fact being carried on: City of Toronto v. Bell Telephone Co. of Canada, [1905] A.C. 52 (P.C.) (hereinafter Toronto v. Bell), at p. 59; Winner, supra, at pp. 581-82; The Queen in the Right of the Province of Ontario v. Board of Transport Commissioners, [1968] S.C.R. 118, at p. 127 (hereinafter the 'Go-Train' case); Kootenay & Elk Railway Co. v. Canadian Pacific Railway Co., [1974] S.C.R. 955, at pp. 979-80 (hereinafter Kootenay & Elk Railway Co.); Saskatchewan Power Corp. v. TransCanada Pipelines Ltd., [1979] 1 S.C.R. 297, at p. 308; Luscar Collieries Ltd. v. McDonald, [1925] S.C.R. 460, at p. 475 (hereinafter Luscar Collieries).

It is impossible, in my view, to formulate in the abstract a single comprehensive test which will be useful in all of the cases involving s. 92(10)(a). The common theme in the cases is simply that the court must be guided by the particular facts in each situation, an approach mandated by this Court's decision in Northern Telecom, 1980, supra. ..."

(pages 257-258; emphasis added)

That judgment is doubly relevant here because it dealt with an undertaking that provided services similar, in the technological means used and in the type of communications possible, to those provided by National Pagette.

Certain other judgments dealing with undertakings that provided communications services are also relevant. In Corporation of the City of Toronto v. Bell Telephone Company of Canada, [1905] A.C. 52, the Privy Council recognized federal jurisdiction over an interprovincial telephone undertaking. That jurisdiction is based on the federal jurisdiction over interprovincial telegraphs provided for in section 92(10)(a) of the Constitution Act.

"The British North America Act, 1867, in the distribution of legislative powers between the Dominion Parliament and provincial legislatures, expressly excepts from the class of 'local works and undertakings' assigned to provincial legislatures 'lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces or extending beyond the limits of the province': sect. 92, sub-s. 10(a). Sect. 91 confers on the Parliament of Canada exclusive legislative authority over all classes of subjects so expressly excepted. It can hardly be disputed that a telephone company the objects of which as defined by its Act of incorporation contemplate extension beyond the limits of one province is just as much within the express exception as a telegraph company with like powers of extension. ..."

(pages 56-57)

In Re Regulation and Control of Radio Communication in Canada, supra, the Privy Council recognized the federal government's jurisdiction over radiocommunications; its decision was based, inter alia, on the federal jurisdiction over interprovincial telegraphs provided for in section 92(10)(a) of the Constitution Act. In that judgment, the Privy Council also based federal jurisdiction on Parliament's power to make laws for the peace, order and good government of Canada, which authorized it in the case in question to make laws to implement an international radiotelegraph treaty. The Privy Council later overturned this part of its judgment in Labour Conventions Reference, [1937] A.C. 326.

Re Regulation and Control of Radio Communication in Canada, supra, has since been applied on several occasions in cases involving cable television undertakings. In two judgments - Capital Cities Communications Inc. et al. v. Canadian Radio-Television Commission, [1978] 2 S.C.R. 141, and Public Service Board et al. v. François Dionne et al., [1978] 2 S.C.R. 191 - the Supreme Court recognized federal jurisdiction over cable television undertakings on the basis, as in Re Regulation and Control of Radio Communication in Canada, supra, of section 92(10)(a) of the Constitution Act, although it did not resort to Parliament's power to make laws for peace, order and good government.

It should be noted that most of the cases based on this Privy Council judgment dealt with broadcasting undertakings or broadcasting legislation.

As for the Board, issues of this nature are regularly brought before it and, ultimately, determined its own jurisdictional authority. In view of the facts of the case and of the arguments of the parties, the following decisions are relevant.

In Byers Transport Limited et al. (1986), 65 di 127; and 12 CLRBR (NS) 236 (CLRB no. 571), the Board brought out two types of problems with respect to constitutional issues.

"Broadly speaking, there are two kinds of problems with respect to constitutional issues that arise in the labour context. One is the identification of a core federal undertaking - whether it exists at all, and, assuming it does, fixing its limits. A different type of problem arises where there is clearly a core federal undertaking in the picture, but the question is whether a particular subsidiary operation is sufficiently vital to the core federal undertaking so as to also be brought under federal jurisdiction. (See Cook Brothers Transport Limited (1985), 61 di 129 (CLRB no.

519), at pages 136-137; Mettrans (Western) Inc., No. 26/86, January 30, 1986 (BCLRB), at page 5.)"

(pages 131; and 240)

After having concluded that the undertaking in question raised the first type of problem, the Board added:

"In the transportation industry, it has been clear since Attorney General for Ontario et al. v. Winner et al., [1954] A.C. 541 (P.C.), that one does not look at a particular aspect of a business in isolation and conclude that it is provincial because it is intraprovincial. For constitutional purposes, one starts by identifying an undertaking, something that operationally functions as a whole. One examines the normal and habitual activities of that undertaking as a whole, and as a going concern, to establish constitutional jurisdiction. In the transportation industry, an undertaking is federal if a regular and continuous part of its business is extraprovincial (Re Ottawa-Carleton Regional Transit Commission and Amalgamated Transit Union, Local 279 et al. (1983), 4 D.L.R. (4th) 452 (Ont. C.A.). ..."

(pages 131; and 240-41)

In Emery Worldwide (1989), 7 CLRBR (2d) 49 (CLRB no. 768) (application for review dismissed by the Federal Court of Appeal on October 16, 1990), the Board decided that a regional office of an international freight shipper fell within federal jurisdiction.

"Why is Emery federal? Emery operates a core federal undertaking by virtue of its regular and continuous connections with the United States. The daily flights from Dayton, Ohio, to Toronto, Montreal and Ottawa, for example, are sufficient to render Emery Worldwide a core federal undertaking in Canada. ..."

(page 52)

These Board decisions, which dealt with transport undertakings, apply to this case because they also involved determining whether those undertakings were local or interprovincial in nature.

c) Legal Theory

Peter W. Hogg commented on the Supreme Court judgment in Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission), supra, shortly after it was handed down. He summarized the constitutional background in telecommunications matters as follows:

"Legislative authority over telecommunications depends upon s. 92(10) of the Constitution Act, 1867 (U.K.). Section 92(10) confers authority on the provincial Legislatures to make laws in relation to:

'Local Works and Undertakings other than such as are of the following Classes:

(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;

(b) Lines of Steam Ships between the Province and any British or Foreign Country;

(c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of two or more of the Provinces.'

The three classes of undertaking excepted by paragraphs (a), (b) and (c) come within the legislative authority of the federal Parliament by virtue of s. 91(29) of the Constitution Act, 1867 (U.K.).

The basic scheme of distribution of power established by s. 92(10) is this. Communications undertakings that remain within the boundaries of a single province are 'local', and therefore within provincial authority under the opening words of s. 92(10). Communications undertakings that connect the province with other provinces or extend beyond the limits of the province are within federal authority under paragraph (a) of s. 92(10). An exception to this dichotomy is created by paragraph (c) of s. 92(10), which brings into federal jurisdiction local works that have been declared by the Parliament of Canada to be 'for the general advantage of Canada'."

(Peter W. Hogg, "Jurisdiction Over Telecommunications: Alberta Government Telephones v. CRTC" (1990), 35 McGill Law Journal 480, pages 482-483)

2. The Reasons for Decision

As we saw in the Supreme Court judgment in Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission), supra, it is necessary to look into National Pagette's activities in order to determine whether they are local or interprovincial in nature or character since, according to the very words of the judgment, "The case law clearly establishes that if a work or undertaking falls within s. 92(10)(a) it is removed from the jurisdiction of the provinces and exclusive jurisdiction lies with the federal Parliament" (page 257).

In its submissions to the Board, National Pagette has not approached the question from this angle. Instead, it claims to fall within provincial jurisdiction under the powers granted to the provinces by sections 92(13) and (16) of the Constitution Act. However, this argument has already been dismissed by the courts. The Privy Council dealt with it in Attorney-General for Ontario and Others v. Israel Winner and Others, [1954] A.C. 541, and held as follows:

"It would not be desirable, nor do their Lordships think that it would be possible, to lay down the precise limits within which the use of provincial highways may be regulated. Such matters as speed, the side of the road upon which to drive, the weight and lights of vehicles are obvious examples, but in the present case their Lordships are not faced with considerations of this kind, nor are they concerned with the further question which was mooted before them, viz., whether a province had it in its power to plough up its roads and so make inter-provincial connections impossible. So isolationist a policy is indeed unthinkable. The roads exist and in fact form a connexion with other provinces and also, in this case, with another country. Since in their Lordships' opinion Mr. Winner is carrying on an undertaking connecting New Brunswick both with Nova Scotia and the State of Maine there exists and undertaking connecting province with province and extending beyond the limits of the province.

Prima facie at any rate, such an undertaking is entrusted to the control of the Dominion and taken out of that of the province. No doubt if it were not for section 90(10)(a) of the British North America Act the province, having jurisdiction over local works and undertakings and over property and civil rights within the province, could have prohibited the use of, or exercised complete autocratic control over, its highways, but the subsection in question withdraws this absolute right where the undertaking is a connecting one. To this limitation some meaning must be given, and their Lordships cannot accept the view that the jurisdiction of the Dominion is impaired by the province's general right of control over its own roads. So to construe this subsection would, in their Lordships' opinion, destroy the efficacy of the exception."

(pages 576-577)

The Privy Council refused to rule on this question in A. Regulation and Control of Radio Communication in Canada, supra, but the Supreme Court had answered it in the negative at the preceding level:

"... The two subsections of s. 92 relied on by counsel for the Provinces were s-ss. (13) and (16). No doubt, in some aspects, radio communication has to do with 'Property and Civil Rights in the Provinces;' but so have many other subjects which have been held to fall within some one of the enumerated heads of s. 91, and as to which the concluding paragraph of that section establishes the exclusiveness of Dominion legislative jurisdiction over them. (Attorney-General for Can. v. Attorneys-General for Ont., Que. and N.S. (The Fisheries Case), [1898] A.C. 700, at p. 715; Toronto Elec. Com'rs v. Snider, [1925] 2 D.L.R. 5, at p. 11). Radio communication in this respect does not differ from any of such other subjects."

(Re Regulation and Control of Radio Communication, [1931] 4 D.L.R. 865, pages 866-867)

The question to be answered therefore remains the same: it involves ascertaining the nature of the undertaking. If it is of the same nature as those excepted under section 92(10) of the Constitution Act, it is a federal undertaking within the meaning of the Code.

After consideration of the case, the Board reached the conclusion that National Pagette is a federal work, undertaking or business within the meaning of section 2(b) of the Code. The company carries out its activities through both radiocommunications and telecommunications means that connect other provinces on a regular and continuous basis.

It therefore seems clear to us that National Pagette engages in activities related to communications. By means of its answering service, it receives and transmits its clients' notices and messages using various technologies. Its paging service enables its clients to remain in contact with their homes or offices no matter where they are in Canada.

At the very least with respect to its paging service, which is the bulk of its clients, National Pagette is similar to both a telecommunications undertaking and a radiocommunications undertaking. As we saw above, the joint effect of the electromagnetic waves and the pager is not the whole of transmitting a message, as the telephone must be used at certain points of the process. These three elements are inseparable. The paging service is, as it were, an extension of the telephone; the pager takes over where telephone service is either lacking or incapable of providing the desired service. This is what led us to conclude that National Pagette also carries out telecommunications activities.

The fact that National Pagette does not own telephone equipment (lines, poles, etc.) is no reason for not considering the telephone's contribution to National Pagette's paging activities. All technologies used in paging are complementary and necessary. Moreover, as we know, "Ownership itself is not conclusive" (Alberta

Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission), supra, page 228).

National Pagette submits that it does not operate a telecommunications system. It says that it only uses already existing systems in the same way as a Montréal law office uses a data transmission line in the course of its business. It therefore claims that the mere use of electromagnetic waves is not enough to make it a federal undertaking. In the same way, it submits that Re Regulation and Control of Radio Communication in Canada, supra, can no longer be applied to all radiocommunications undertakings because it has been proven that the effects of the [redacted] now be kept within the boundaries of a province. In support of its position, it refers to several court judgments that recognize provincial jurisdiction in radiocommunications matters, including the Supreme Court judgments in Attorney-General of Quebec v. Kellogg's Company of Canada et al., [1978] 2 S.C.R. 211; and (1978), 83 D.L.R. (3d) 314; and Irwin Toy Ltd. v. Quebec (Attorney-General), [1989] 1 S.C.R. 927; and (1989), 58 D.L.R. (4th) 577. National Pagette also supports its claim that it does not operate telecommunications system with passages from the Supreme Court judgment in Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission), supra.

The evidence shows that National Pagette is much more than a user, however: telecommunications is the very essence of its commercial activities. As Carolyn Ross testified, the company owns and maintains a large part of the equipment required for its activities: repeaters, transmitters, computers, certain towers, etc. It has obtained the licences required under the Radio Act, supra, in the

Department of Communications. It has set up integrated networks that can be used for local, regional or nationwide paging services. It has signed agreements with Telecom Canada, from which it rents DATAPAC lines, and also rents telephone lines from telephone companies. It has done everything to operate a telecommunications undertaking. National Pagette cannot be compared, as it claims, with a law office. Law offices use means of communications to carry out their own business, whereas means of communications are at the core of National Pagette's business and enable it as such to serve its customers. National Pagette as depicted to us would not exist if it did not enable its clients to communicate with each other.

The case law referred to by National Pagette in support of a provincial jurisdiction in communications matters does not apply here. In Attorney-General of Quebec v. Kellogg's Company of Canada et al., supra, and Irwin Toy Ltd. v. Quebec (Attorney-General), supra, the Supreme Court upheld the validity of provisions of the Quebec Consumer Protection Act and the regulations adopted under that Act. Those provisions did not infringe federal jurisdiction, as their object was to control advertising rather than to control television and broadcasters.

The Board does not have to rule on the soundness of National Pagette's argument that the applicability of Re Regulation and Control of Radio Communication in Canada, supra, is now limited in the light of subsequent scientific and technological advances making it possible to restrict the effects of waves within one province's boundaries. Even were we to accept this claim by the employer, it would not be relevant because the evidence shows that the undertaking in question transmits waves between provinces. In the

circumstances, to reach the conclusion sought by National Pagette would also amount to denying federal jurisdiction over interprovincial telegraphs.

Finally, counsel for National Pagette distinguishes it from Alberta Government Telephones (AGT) because AGT is "organized in a manner which enables it to play a crucial role in the national telecommunications system" (Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission), supra, page 262), whereas the same cannot be said of National Pagette. If comparisons can be made between these two undertakings, they obviously cannot be made on this aspect. AGT is an Alberta Crown corporation that only has customers and equipment in Alberta; it only has interconnections with other telephone companies at the borders of the province. It was therefore necessary to analyze its structure, its links with its business partners and its role in communications outside of Alberta to determine its constitutional status correctly. This is not the case with National Pagette.

This brings us to the question of National Pagette's interprovincial activities.

The evidence establishes that some of its clients use either the nationwide network or the joint service of Bell Cellular and National Pagette. In addition to this, there are regular, cross-border communications between Quebec and Ontario.

The evidence also shows that these activities are carried out during the normal and habitual course of National Pagette's activities. There is no doubt that this reflects National Pagette's intent and objectives. It endeavored to

set up a nationwide network made up of regional and local networks, and has concluded business agreements with partners that enable it to put that network into actual operation. It has installed repeater and transmitter towers at the border between Quebec and Ontario, where they transmit waves from one province to the other on a regular and continuous basis. All these factors demonstrate a willingness to operate an interprovincial undertaking and, indeed, the actual operation of such an undertaking.

National Pagette tried to downplay the significance of its interprovincial activities by stressing the small income they generate and the percentage of users to conclude that they are insufficient to characterize it as a federal undertaking. It bases this argument on the following judgments: Agence Maritime Inc. v. Conseil canadien des relations ouvrières et al., [1969] S.C.R. 851; and (1969), 12 D.L.R. (3d) 722; Regina v. Manitoba Labour Board Ex parte Invictus Ltd. (1967), 65 D.L.R. (2d) 517 (Man. Q.B.); Re Windsor Airline Limousine Services Ltd. and Ontario Taxi Association 1688 et al. (1980), 117 D.L.R. (3d) 400 (Ont. H.C.J., Div. Ct.); and Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission), supra.

In the first three cases, the courts held that the undertakings involved were under provincial jurisdiction because of the infrequent and irregular nature of their interprovincial activities. In Agence Maritime Inc. v. Conseil canadien des relations ouvrières et al., supra, the undertaking, a carrier plying the waters of the St. Lawrence River, had only taken three trips outside the province in two years. In Re Windsor Airline Limousine Services Ltd. and Ontario Taxi Association 1688 et al., supra, the facts

did not reveal that the undertaking had taken any action to carry out extraprovincial activities: the drivers picked customers up at the airport and drove them to Detroit if such was their destination. On the return trip, they were at liberty, like any taxicab, to bring someone back if they had the opportunity to do so. Nor did the facts show regular extraprovincial activities in Regina v. Manitoba Labour Board Ex parte Invictus Ltd., supra: the company sporadically transported horses out of the province and, although it had licences to transport certain goods out of the province, it had never done so.

National Pagette also based its argument on the following comments by Mr. Justice Reed of the Federal Court in Alberta Government Telephones v. Canadian Radio-television and Telecommunications Commission et al., [1985] 2 F.C. 472, which were repeated by Mr. Justice Dickson in the Supreme Court judgment: a "significant amount of continuous and regular extraprovincial activity" (page 481).

Mr. Justice Reed explained this statement as follows:

"This test does not demand that the extraprovincial portion of an undertaking's enterprise must dominate but it does mean that occasional and irregular extraprovincial activity will not lead to a characterization of the enterprise as falling within federal jurisdiction. ..."

(page 481)

The evidence before us is clear, and the Board has no difficulty recognizing the normal or ongoing nature of National Pagette's interprovincial activities. The fact that those interprovincial activities are carried out through its branches or regional or local offices does not alter their interprovincial nature. It is in fact necessary

for somebody somewhere to make the connections. At any rate, we have seen that National Pagette's technical services are organized at the national level and are outside the organizational control of the regional managers.

The comments by Mr. Justice Reed quoted above only confirmed the case law. The dictum of Mr. Justice Beetz in Construction Montcalm Inc. v. The Minimum Wage Commission et al., [1979] 1 S.C.R. 754, which was reworded in Northern Telecom Limited v. Communications Workers of Canada, [1980] 1 S.C.R. 115, established the test of the regular and continuous nature of the activities.

"(5) The question whether an undertaking, service or business is a federal one depends on the nature of its operation.

(6) In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of 'a going concern', without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity."

(Northern Telecom Limited v. Communications Workers of Canada, supra, page 132)

We should add that the Supreme Court reiterated and confirmed this principle in Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission), supra.

The Board also applies this concept when it has to rule on such questions. In Byers Transport Limited et al., supra, the Board applied it to the activities of a trucking company. On this topic, see the relevant passage quoted above (page 28).

It emphasized the regular nature of extraprovincial activities once again in Emery Worldwide, supra:

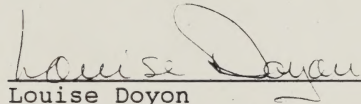
"... The daily flights from Dayton, Ohio, to Toronto, Montreal and Ottawa, for example, are sufficient to render Emery Worldwide a core federal undertaking in Canada. All its related regional offices are also within federal jurisdiction even though, if they were operated by a third party, such operations might be wholly provincial. This is not a situation where Emery's regional offices in Canada operate separate and distinct undertakings such that the reasoning found in Canadian Pacific Railway Co. v. A.G. B.C., [1950] A.C. 122 (P.C.) would apply. All of Emery's offices combine to form one indivisible undertaking."

(page 52)

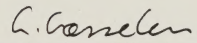
The Board therefore concludes that National Pagette is an undertaking that carries out radiocommunications and telecommunications activities. Its use of electromagnetic waves, essential to its activities, makes it part of the radiocommunications industry; its equally essential use of telephone equipment and the nature of the services it offers its clients makes it part of the telecommunications industry. Those activities establish interprovincial communications on a regular and continuous basis. This makes it a federal undertaking within the meaning of section 92(10)(a) of the Constitution Act, which was mentioned in Re Regulation and Control of Radio Communication in Canada, supra, and in Corporation of the City of Toronto v. Bell Telephone Company of Canada, supra. In those two cases, the Privy Council based its decision on the federal jurisdiction over interprovincial telegraphs, which it is again possible to do with respect to paging activities, numerous developments in the field since then notwithstanding.

For all these reasons, the Board determines that it has the constitutional jurisdiction to hear the three complaints of unfair labour practice.

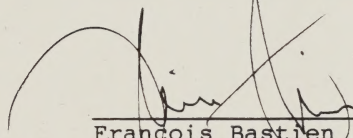
This decision is unanimous.



Louise Doyon
Vice-Chair



Ginette Gosselin
Member of the Board



François Bastien
Member of the Board

DATED at Ottawa, this 30th day of November 1990.

CCRT/CLRB - 836

For all these reasons, the Board determines that it is the
policy of the Board to require that all persons who are
employed by the Board shall be required to take the
following oath of office:

I, _____, do hereby swear that I am a
person of good character and of good reputation,
and that I am not a member of any organization
the purpose of which is to defame the Government
of the United States, or to obstruct justice,
or to interfere with the administration of the
Government of the United States, or to
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